Supreme Court, U. S.
FILED
DEC 12 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-850

ARTHUR H. KEYES, JR. and LUCILLE KEYES,
on behalf of themselves and others
similarly situated,
Petitioners,

v.

THE DISTRICT OF COLUMBIA, A Municipal Corporation
and WALTER E. WASHINGTON, and KENNETH BACK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

GILBERT HAHN, JR.
11th Floor
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Petitioners

MARY KATHLEEN HITE
DENNIS OAKES
MAYNARD H. DIXON
WOLF, BLOCK, SCHORR and SOLIS-COHEN
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

I N D E X

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented	5
U. S. Constitutional Provision Involved	5
Statement of the Case	6
Reasons for Granting the Writ	13
Conclusion	18
Appendix	
Opinion of the Court of Appeals dated July 23, 1976	A-1
Opinion and Order of the Superior Court dated April 23, 1974	A-16
Opinion and Order of the Superior Court dated August 6, 1974	A-60
Opinion of the Court of Appeals in District of Columbia v. Green, dated October 9, 1973	A-74
Opinion of the Court of Appeals in District of Columbia v. Burlington dated January 29, 1976	A-90
Order of the Court of Appeals of February 27, 1976	A-145
Opinion of the Court of Appeals in	

Page

District of Columbia v. Burlington dated June 13, 1977 . . . . . A-147

Petitioners' "Motion to the Court En Banc to Withdraw the Mandate of this Court In Order to Prevent Injustice and Grant Hearing En Banc in No. 8790 Because of District of Columbia v. Burlington, Decided June 13, 1977" A-164

Order of the Court of Appeals dated September 13, 1977 . . . . A-194

Petitioners' "Motion to Withdraw and Stay Mandate Pending Application to the Supreme Court of the United States for a Writ of Certiorari" A-196

Order of the Court of Appeals dated October 11, 1977 . . . . . A-202

TABLE OF CITATIONS

Page

Cases:

Barr v. City of Columbia, 378 U.S. 146 (1964) 16,18

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 16,17

District of Columbia v. Berenter, 466 F.2d 367 (1972) 11

District of Columbia v. Burlington, No. 7986 (D.C.App.January 29, 1976) (Vacated) 9,10, 11,14,17

District of Columbia v. Burlington, 375 A.2d 1052 (1977) 2,9,17

District of Columbia v. Green, 310 A. 2d (1973) 7,8, 10,17

Key v. Dole, 46 U.S.L.Week 4009 (U.S. November 14, 1977) 13

Mayer v. City of Chicago, 404 U.S. 189 (1971) 15,18

NAACP v. Alabama, 357 U.S. 449 (1958). . 15,16, 18

Staub v. City of Baxley, 355 U.S. 313 (1958) 16,18

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). 15,18

Wright v. State of Georgia, 373 U.S.

274 (1963) 16,18

Constitutional and Statutory Provisions:

Due Process Clause of the Fifth Amendment 5

28 U.S.C. §1257(3) 4

Title I, D.C. Code §1501 et seq. . . . 6

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO.

ARTHUR H. KEYES and LUCILLE KEYES,
On behalf of themselves and others
similarly situated,

Petitioners,

v.

THE DISTRICT OF COLUMBIA, a Municipal
Corporation and WALTER E. WASHINGTON,
and KENNETH BACK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

Arthur H. Keyes, et al., petitioners, appellees below, respectfully pray that a writ of certiorari issue to review the judgment of

the District of Columbia Court of Appeals entered on September 13, 1977 in District of Columbia, et al. v. Arthur H. Keyes, et al., No. 8790

OPINIONS BELOW

The first Opinion of the Court of Appeals in the instant case is reported at 362 A.2d 729 (1976) and is reprinted in the Appendix, infra, p. A-1. The subsequent per curiam order of the District of Columbia Court of Appeals in the instant case is not yet reported and is reprinted in the Appendix, infra, p. A-194.

The Opinions of the Superior Court of the District of Columbia, Tax Division, in the instant case, are unreported and are reprinted in the Appendix, infra, p. A-16 and p. A-60. The Opinion of the District of Columbia Court of Appeals in the case of District of Columbia v. Burlington, is reported at 375 A.2d 1052 (1977) and is reprinted in the Appendix, infra,

p. A-147.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was initially entered on July 23, 1976. Petitioners' Petition for Rehearing or Rehearing En Banc was timely filed on September 16, 1976, and was denied by the Court of Appeals on November 26, 1976. On December 27, 1976 the Court of Appeals filed an order granting a stay of mandate for the period of time permitted by law for the filing of a petition for a writ of certiorari. Petitioners' writ of certiorari was timely filed on February 23, 1977, and was denied by this Court on April 18, 1977 (97 Sup.Ct. 1651).

On July 7, 1977 Petitioners filed a motion with the District of Columbia Court of Appeals to withdraw its mandate and to grant a hearing en banc. (Appendix, infra, p. A-164) Petitioners' motion was denied by

the District of Columbia Court of Appeals en banc on September 13, 1977 (Appendix, infra, p. A-194).

On September 22, 1977 petitioners moved the District of Columbia Court of Appeals to withdraw and stay its mandate pending application to this Court for a writ of certiorari. Petitioners' Motion was denied, per curiam, on October 11, 1977. (Appendix, infra, p. A-202).

On October 27, 1977 petitioners moved this Court for leave to file a petition for writ of mandamus to require the recall of the mandate prior to the expiration date of the present term of the Court of Appeals, which motion is pending before the Court at the time of the filing of this Petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did an "ex parte" proceeding take place where the petitioners and respondents were advised during the proceedings in the instant case by the highest court in the District of Columbia that a "certain decision" was the law of the jurisdiction and when the appellate court, during the proceedings, later vacated that "certain decision" notifying respondents but not the petitioners?

2. Did the highest court of the District of Columbia deny petitioners their constitutional right to a hearing on their constitutional claim when the appellate court held an ex parte proceeding?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> No person shall. . .be deprived of life, liberty or property, without due process of law. . .

STATEMENT OF THE CASE

Prior to fiscal year 1973 all the 96,000 single-family residential properties in the District of Columbia were assessed for real estate tax purposes in the same way. The fair market value of the property was reduced to a fixed percentage known as the "level of assessment". Prior to fiscal year 1973 the "level of assessment" was 55 percent of fair market value for all single-family properties. (App. pp. A-2, A-77.)

In preparing the assessments for fiscal year 1973, the responsible officials of the District of Columbia charged with the administration of the tax laws, acting secretly and without notice to the public as required by the District of Columbia Administrative Procedures Act, Title 1 D.C. Code §1501 et seq., raised the level of assessment for approximately 34,000 of the 96,000 homeowners in the city from 55 to 60 percent (App. pp. A-63/65).

The tax for fiscal year 1973, based upon these secret and unrevealed unequal assessments was levied and collected from the taxpayers in question. (App. pp. A-63/65.)

In preparing the assessments for the following year 1974, the same officials of the District raised the level of assessment for an additional 44,000 of the 96,000 homeowners from 55 to 60 percent. However, before the taxes were levied and collected for fiscal year 1974, the discriminatory assessments were "reluctantly made public" by the District of Columbia officials in June, 1973, during the trial of an action brought to enjoin the fiscal year 1974 taxes and entitled Green v. District of Columbia. Accordingly, the Superior Court of the District of Columbia enjoined the levy and collection of these taxes for fiscal year 1974 as unconstitutional as denying equal protection as read into the Fifth Amendment. The District of

Columbia Court of Appeals affirmed. District of Columbia v. Green, 310 A.2d 348 (1973). (App. p. A-74.)

The instant case (Keyes) was thereupon filed as a class action to recover the unconstitutional tax levied and paid by the 34,000 homeowners for fiscal year 1973, at a time prior to the revelation of the deceit of the District officials. The trial court ordered a refund of the unconstitutional tax collected. (App. pp. A-69/73.) The trial court ignored the defense of the District that taxpayers had failed to take timely administrative appeals, and directed refund of the unconstitutional taxes.

On appeal, the District of Columbia Court of Appeals acknowledged the taxes to have been unconstitutionally levied and collected, but nevertheless reversed.

Petition for Writ of Certiorari was taken to this Court in the October Term,

1976 and the Writ was denied April 18, 1977. The mandate of the District of Columbia Court of Appeals issued on April 26, 1977.

Following the denial of the Writ of Certiorari by this Court and following the issuance of mandate by the District of Columbia Court of Appeals a most bizarre set of circumstances came to light on June 13, 1977 that raised the Constitutional issue that brings petitioners back to this Court with a second petition for Writ of Certiorari.

District of Columbia v. Burlington, 375 A.2d 1052 (hereinafter referred to as "Burlington II") (Appendix, infra, p. A-147) was decided June 13, 1977. In that opinion, the Court, en banc, said:

> On April 23, 1976, we granted appellee's petition for hearing en banc and vacated the January 29 (1976) decision. [at p. 1053]

(The January 29, 1976 decision of Dis-

trict of Columbia v. Burlington, unreported slip opinion D.C. App. 1976, is hereinafter referred to as "Burlington I".) (Appendix, infra, p. A-90.)

The Keyes case was argued in the Court of Appeals on December 5, 1974. Following briefing and argument, the three judge panel, on February 27, 1976, issued an Order (Appendix, infra, p. A-145) asking the parties to submit memoranda addressing the following extraneous question not covered in the briefs of either party:

> Bearing in mind (a) that this court in District of Columbia v. Green (310 A.2d 848 (1973)) specifically approved the trial court's finding that an injunctive remedy was available in that case due to the "exceptional and extraordinary" circumstances there presented. (at 853) and (b) that this court recently reiterated that proposition in District of Columbia v. Burlington Apartment House Company T/A The Burlington Hotel, D.C.App. A.2d No. 7986, January 29, 1976) [Burlington I] at pages 4-5 of the slip opinion, are the appellees in this case barred from the relief sought

> by reason of their failure to pursue their statutory remedies in seeking refunds for the fiscal year here involved. In addressing themselves to the question, the parties should discuss District of Columbia v. Berenter, 151 U.S.App. 196, 466 F.2d 367 (1972). (Emphasis supplied.)

Comments on this question of the necessity of an appeal to the Board of Equalization and Review in tax refund cases were filed by counsel for the District of Columbia on March 15, 1976 and by counsel for the Keyes taxpayers on March 24, 1976.

One month after the March 24, 1976 filing by the Keyes taxpayers, the Court of Appeals vacated Burlington I on April 23, 1976, telling the District of Columbia but not the Keyes taxpayers. Keyes was decided four months later on July 23, 1976.

It is undisputed that taxpayers, petitioners here, were never notified and never knew that Burlington I had been vacated on April 23, 1976 until June 13, 1977, but that the District of Columbia, et al., respondents

here, were notified and did know of that vacation.

Upon learning that the above had occurred, petitioners immediately filed a motion, with the District of Columbia Court of Appeals to withdraw its mandate and to grant a hearing en banc, (Appendix, infra, p. A-164) which was denied by the Court of Appeals en banc on September 13, 1977. (Appendix, infra, p. A-194.).

On September 22, 1977 petitioners moved the District of Columbia Court of Appeals to withdraw the mandate of April 26, 1977 on the procedural grounds that relief would be denied with the ending of the 1977 term of the District of Columbia Court of Appeals on December 31, 1977 if petitioners ultimately prevail on the merits.

The Court of Appeals denied this motion October 11, 1977, after which petitioners moved this Court on October 27, 1977 for leave to file Petition for Writ of Mandamus to require recall of the mandate before December 31, 1977 so that relief might not be denied if petitioners ultimately prevail on the merits. At the time of filing of this petition for Writ of Certiorari, the October 27, 1977 motion for leave to file Petition for Writ of Mandamus is pending.

REASONS FOR GRANTING THE WRIT

This case arises in a narrowly defined area of concern which affects the fairness of hearings in the 50 highest state Appellate Courts and the Court of Appeals for the District of Columbia. cf. Key v. Doyle, 46 U.S.L.Week 4009 (U.S. November 14, 1977).

The District of Columbia Court of Appeals, in this case, acted to deny petitioners a "hearing". The denial of that

"hearing" prevented petitioners from ever having a hearing on the merits on their claim to have been unconstitutionally deprived of their property.

The petitioners were denied a "hearing" because the District of Columbia Court of Appeals held an "ex parte" proceeding from which petitioners were excluded.

The "ex parte" proceeding took place in the following way (more fully described at Appendix, infra, p. A-166 to A-169 and A-177 to A-179 and the Statement of the Case, supra). Following argument on the merits of Keyes before the panel that heard the case, the panel on February 27, 1976 addressed the parties, in such a way as to require the parties to respond, assuming that Burlington I (Appendix, infra, p. A-90) was "the law of the District of Columbia". On April 23, 1976 (one month after the parties responded) Burlington I was vacated. Respon-

dents were informed of this, but petitioners were not. Keyes was decided four months later on July 23, 1976 on the Burlington I principle of failure to pursue statutory remedies.

Holding an "ex parte" hearing or proceeding in a highest state court or in the District of Columbia Court of Appeals is a violation of "due process" of either the Fourteenth or the Fifth Amendments respectively because no fair hearing has been held.

This Court has a well-defined "threshold" test for the failure to give a "fair hearing" in the highest appellate court. Cases along that threshold where the highest state appellate court has failed to give a "fair hearing" on the merits are, for example: NAACP v. Alabama, 357 U.S. 449 (1958) and Mayer v. City of Chicago, 404 U.S. 189 (1971) ("novel procedural requirements" to thwart hearing); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (arbitrary appli-

cation of rule to prevent hearing); Barr v. City of Columbia, 378 U.S. 146 (1964), (inconsistent application of rule to prevent hearing); Wright v. State of Georgia, 373 U.S. 284 (1963) and Staub v. City of Baxley, 355 U.S. 313 (1958), (arbitrary application of rule to prevent hearing).

Compare NAACP v. Alabama, et seq. with Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930).

The facts in Keyes clearly fall well within the "threshold". An "ex parte" proceeding took place. Therefore, there was no "fair hearing" on petitioners' constitutional claims.

The Fourteenth and Fifth Amendments require that the proceedings before the appellate court once instituted be fair and even handed. This court, from NAACP, supra, to Mayer, supra, has set as the minimum standard

for the final state appellate proceeding that there be a "fair hearing".

As the result of the denial of a hearing, the District of Columbia Court of Appeals never heard petitioners' constitutional claim on the merits. That constitutional claim was to enforce petitioners' federal right under the constitution to recover property. That property was taken under an admittedly unconstitutional and discriminatory tax. Green, supra. cf. Brinkerhoff, supra.

Burlington II (Appendix, infra, p. A-147), which was later decided, reversed Burlington I. Burlington II would have permitted recovery of the unconstitutional and discriminatory tax.

The "ex parte" proceeding denied petitioners the right ever to argue their claim of an unconstitutional exaction.

Moreover, the District of Columbia Court of Appeals has no published rule with respect to when or how or to whom it announces the vacation of opinions. In this instance, the court must be said to have operated with either a "novel rule", the arbitrary application of a non-rule, or the arbitrary action of the court where there was no rule at all. The effect, in any event, was to create an "ex parte" proceeding and deny petitioners a "hearing". Mayer v. City of Chicago, supra; Sullivan v. Little Hunting Park, Inc., supra; Barr v. City of Columbia, supra; Wright v. State of Georgia, supra; NAACP v. Alabama, supra; Staub v. City of Baxley, supra.

CONCLUSION

In the absence of review by this Court, the District of Columbia Court of Appeals will have successfully deprived Petitioners

of due process of law.

Petitioners respectfully urge that the writ of certiorari issue and that after hearing this Court remand to the District of Columbia Court of Appeals for a hearing on the unheard constitutional issue before either the full bench of that Court or a different panel of that Court.

Respectfully submitted.

Gilbert Hahn, Jr., Esq.
Wolf, Block, Schorr and
Solis-Cohen
11th Floor
1150 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorneys for Petitioners

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 8790

THE DISTRICT OF COLUMBIA, a Municipal Corporation,
and
WALTER E. WASHINGTON, and KENNETH BACK,
APPELLANTS,

v.

ARTHUR H. KEYES, JR., and LUCILLE KEYES,
On behalf of themselves and others similarly situated,
APPELLEES.

Appeal from the Superior Court of the
District of Columbia

(Argued December 5, 1974 * Decided July 23, 1976)

Louis P. Robbins, Principal Assistant Corporation Counsel, with whom *C. Francis Murphy*, Corporation Counsel at the time the brief was filed, *Henry E. Wixon* and *Richard L. Aguglia*, Assistant Corporation Counsel, were on the brief, for appellants.

Gilbert Hahn, Jr., with whom *Jack C. Sando* was on the brief, for appellees.

Before KELLY and GALLAGHER, Associate Judges, and PAIR, Associate Judge, Retired.

---

* At the court's request, supplemental post-argument memoranda were submitted by the parties in March 1976.

GALLAGHER, *Associate Judge*: This is an appeal from the Tax Division of the Superior Court of the District of Columbia. The appellees, Arthur H. Keyes, Jr. and Lucille Keyes, filed suit, on behalf of themselves and others similarly situated, against the District of Columbia, Mayor Walter E. Washington, and the Director of the Department of Finance and Revenue, Kenneth Back, appellants, for partial refunds of taxes paid in fiscal year 1973 on all single-family residential properties in the District of Columbia which were assessed at 60% of estimated market value. The trial court held that the appellees are entitled to the relief sought. We reverse.

During calendar year 1971, the level of assessment [1] on approximately one-third of the single-family residential properties [2] in the District of Columbia was raised from 55% to 60% of estimated market value for fiscal year 1973.[3] This change in the level of assessment was part of a plan by the Department of Finance and Revenue of the District of Columbia to achieve a phased increase in the debasement factor (level of assessement) for all single-family residential properties in the District

[1] The level of assessment is also known as the "debasement factor" or "multiplier." This element in the tax computation is the percentage of estimated market value upon which the tax is levied. The assessed value or assessment for an individual piece of real property is obtained by multiplying the estimated market value of the property by the level of assessment. Thus, a dwelling valued at $100,000 is assessed at $55,000 if a 55% debasement factor is applied and at $60,000 if a 60% debasement factor is applied.

[2] It is estimated that this suit involves approximately 34,000 properties.

[3] Assessments of real property are made an a *calendar* year basis for the subsequent *fiscal* year. Fiscal year 1973 ran from July 1, 1972 to June 30, 1973.

of Columbia. Appellants seek to have their refunds measured by the difference between their actual tax bills which they paid for fiscal year 1973 (for which a 60% debasement factor was applied) and the lower tax bills which they would have received if a 55% debasement factor had been applied, plus 6% interest per annum.

In May 1973, an earlier class action was brought by several single-family residential property taxpayers to enjoin the District of Columbia from using unequal levels of assessment in taxing single-family residential properties for fiscal year 1974. This court, in *District of Columbia v. Green*, D.C.App., 310 A.2d 848 (1973) (hereinafter *Green*), affirmed the trial court and held that the District of Columbia's "stairstep" approach to achieve an increased debasement factor for all single-family residential properties was unconstitutional as it resulted in different debasement factors being applied to the same class of property in the same year.[4] Injunctive relief was granted for fiscal year 1974, and the "stairstep" plan was prohibited.

The present suit was brought as an uncertified [5] class action to recover that portion of fiscal year 1973 residen-

[4] *District of Columbia v. Green, supra* at 855. Yet not all inequalities in the assessment of property taxes are necessarily unconstitutional. To illustrate, it has occurred frequently that taxpayers pay different tax bills on property of identical values due to the inability of the assessors to value all property every year. This particular type of lack of equalization between taxpayers has been held "permissible because caused by logistical problems which may be temporarily beyond the power of the city to correct." *District of Columbia v. Green, supra* at 856. We there concluded, in effect, that this logistical factor was not reasonably established.

[5] The trial judge held that certification as a class action and notice to members of the class were unnecessary because

tial property taxes paid which was attributable to the increase of 5% in the level of assessment.[6] The District of Columbia appeals the decision of the trial court granting refunds to the taxpayers on the grounds that (1) under traditional principles of equity and tax reform litigation only prospective relief should have been granted; (2) refunds should not have been granted without proof that appellees bore a substantially disproportionate share of the real property tax burden; (3) the trial judge erred in not permitting the District of Columbia to prove that appellees did not bear a substantially disproportionate share of the real property tax burden; and (4) the trial court erred in permitting appellees to proceed as a class for refunds without certification and individual notice. We hold that appellees are not entitled to refunds either under the statutes of this jurisdiction or by virtue of equitable principles.

The trial court held, insofar as pertinent here, (1) that under the doctrine of collateral estoppel the legal and factual issues as they relate to the conduct of appellants are controlled by the result in *Green*, and (2) that

---

the rules applicable to the Tax Division omitted any mention of class action procedures. We note that effective September 3, 1975, Super. Ct. Civ. R. 23, 23-I and 23-II were incorporated by reference into the Tax Division rules, and purported class action tax suits are now subject to the same criteria with respect to prerequisites, maintainability, and notice as other civil suits. *See* Super. Ct. Tax R. 3.

[6] Notices of tax assessments for fiscal year 1973 were sent out during the period from November 1, 1971 to March 1, 1972. April 2, 1972 was the last day to appeal to the Board of Equalization and Review for any tax assessment for fiscal year 1973. In September 1972 the first installment on property taxes for fiscal year 1973 was due, with the second and final installment due during the month of March 1973.

under principles of equity it would be inappropriate to deny refunds in this case. We believe that, even if the first holding were assumed to be correct, the second is not.

Preliminarily, we observe that this suit was brought in equity and was decided solely on equitable grounds. No statutory remedy was sought or granted and one of the premises of appellees' approach to this litigation is that their potential legal remedies, if any, were inadequate. The rationale of the trial court is essentially that because appellees were held to be entitled to injunctive relief in *Green*, they are *ipso facto* entitled to tax refunds in this case.

Recovery of taxes illegally or erroneously assessed and voluntarily paid was not permitted at common law and is a matter within the purview of the legislative branch. Therefore, refunds of taxes so assessed and paid will not be made absent an authorizing statute. *District of Columbia v. McFall*, 88 U.S.App. D.C. 217, 188 F.2d 991 (1951); *Lindner v. District of Columbia*, D.C.Mun.App., 32 A.2d 540 (1943).[7] Under the statutory procedure

---

[7] *See also, e.g., Snyderman v. Isaacs*, 31 Ill. 2d 192, 201 N.E.2d 106 (1964); *People ex rel. City of Highland Park v. McKibbin*, 380 Ill. 447, 44 N.E.2d 449 (1942), *cert. denied*, 318 U.S. 778 (1943); *People ex rel. Eitel v. Lindheimer*, 371 Ill. 367, 21 N.E.2d 318, *appeal dismissed sub nom., Illinois ex rel. Eitel v. Toman*, 308 U.S. 505 (1939); *Drummond v. Maine Employment Security Comm'n*, 157 Me. 404, 173 A.2d 353 (1961); *Baltimore County v. Churchill, Ltd.*, 271 Md. 1, 313 A.2d 829, *appeal dismissed*, 417 U.S. 902 (1974); *Comptroller of the Treasury v. Campanella*, 265 Md. 478, 290 A.2d 475 (1972); *Wasena Housing Corp. v. Levay*, 188 Md. 383, 52 A.2d 903 (1947); *Universal Film Exchanges, Inc. v. Board of Finance and Revenue*, 409 Pa. 180, 185 A.2d 542 (1962), *cert. denied*, 372 U.S. 958 (1963); *Calvert Distillers Corp. v. Board of Finance and Revenue*, 376 Pa. 476, 103 A.2d 668 (1954).

applicable to this case, the recovery of refunds through appeal to the Superior Court requires, as a first step, a complaint to the Board of Equalization and Review.[8] Subject matter jurisdiction of the Superior Court does not attach until that prerequisite has been satisfied,[9] and a refund based on a final determination of the Superior Court presupposes that the taxpayer has complied with the procedure mandated by the legislature. If "aggrieved" for any reason, the taxpayer must appeal within the permitted time to the Board of Equalization and Review. D.C. Code 1973, § 47-709. This was not done in this case. The taxpayers failed to follow their administrative remedies for fiscal year 1973.

---

[8] D.C. Code 1973, § 47-709 reads in pertinent part:

> Any person aggrieved by any assessment, equalization or valuation made may within six months after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in sections 47-2403 and 47-2404; *Provided, however,* That such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment as herein provided . . . .

This language is also codified in D.C. Code 1973, § 47-2405. The relevant portions of these code provisions were repealed effective June 30, 1975, and the above requirement is now found in D.C. Code 1975 Supp., § 47-646(i).

D.C. Code 1973, § 47-2407 reads:

> Any sum finally determined by the Superior Court to have been erroneously paid by or collected from the taxpayer shall be refunded by the District to the taxpayer from its annual appropriation for refunding erroneously paid taxes in said District.

[9] Payment in full of the tax due is also jurisdictional. *See, e.g., George Hyman Constr. Co. v. District of Columbia,* D.C.App., 315 A.2d 175 (1974); *District of Columbia v. Berenter,* 151 U.S.App.D.C. 196, 466 F.2d 367 (1972).

Appellees contend that the administrative remedies could not have been pursued by any of the taxpayers for fiscal year 1973 because of prior concealment of the "stair-step" plan by District officials. In *Green,* however, we noted that three petitioners "ascertained the existence of, and raised as an issue, the increased level of assessment of their properties" before the Board of Equalization and Review for fiscal year 1974. *District of Columbia v. Green, supra* at 851. These taxpayers not only pursued their administrative remedies but in the process also discovered the now prohibited practice of applying different debasement factors to similarly situated taxpayers. Consequently, we cannot assume, as the trial court did in the case now before us, that a timely administrative challenge to the 1973 taxes for the purpose of obtaining refunds was unavailable or would have been fruitless. The 1973 taxpayers were just as aware as the 1974 taxpayers that their tax bills had been increased.

In *Green,* we agreed with the trial court that the circumstances there were extraordinary and, further, that it would be inequitable to allow those who had bypassed the Board to proceed immediately with the action for injunction while requiring those who had gone to the Board to wait until the expiration of the statutory period before proceeding. Our conclusion was: "The evidence of record supports the findings of the trial court and, as a consequence, it was not error to entertain the [complaint] for injunction." *District of Columbia v. Green, supra* at 853. Thus, we specifically limited our analysis to the context of the relief sought.[10] That is to say, we

---

[10] *Tumulty v. District of Columbia,* 69 U.S.App.D.C. 390, 102 F.2d 254 (1939) was cited in *Green* for the proposition that when an assessment is void, resort to equity may be had

held only that the circumstances before the court were so extraordinary as to warrant a prohibitive writ restraining the practice for fiscal year 1974 and subsequent years. Appellees argue that we should extend this holding to the instant refund case for the prior fiscal year of 1973. We disagree and hold that equitable intervention is not justified in this case.[11]

Moreover, even assuming it were appropriate to apply the principles of equity to the facts before us, we do not

---

without following statutory remedies. *District of Columbia v. Green, supra* at 853. *Tumulty*, however, involved the question of whether an invalid District of Columbia tax claim, filed in a receivership proceeding, could be attacked in that proceeding by parties with other claims against the company in receivership. The United States Court of Appeals held that equity would permit such a collateral attack on the tax claim. Hence, the relief sought and granted in *Tumulty* was preventive in nature (because it precluded assertion of the invalid tax claim) and therefore analogous to the injunctive relief sought and granted in *Green*, but not applicable to the refunds sought here.

[11] We note that the fiscal year 1974 taxpayers who resorted to the Board of Equalization and Review and raised the issue of unequal debasement factors found the Board unresponsive to their arguments. Hence, in *Green*, where only injunctive relief was sought, we stated that a taxpayer in that case had "no meaningful ability to challenge his assessment at all" because the Board declined to inquire into the non-judgmental aspects of the assessment process. *District of Columbia v. Green, supra* at 856. This was one of the extraordinary circumstances upon which the grant of injunctive relief in *Green* was based. However, the fact that an administrative body may wrongly perceive the nature or scope of its powers or responsibilities in a given instance is not a justification for bypassing that body in all instances when it is an essential element in a procedure of purely statutory origin. In fact, it would be a rare instance when taxpayers would not bypass the Board at great peril.

believe that appellees would be entitled to refunds. Regardless of the specific context involved, the distinguishing feature of equity jurisdiction is ". . . the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Thus, it is characteristic of a court of equity that it must take a comprehensive view of the issues before it; and as a result its extraordinary remedies are to be meted out with care. Where the public interest is involved,

> [c]ourts of equity may, and frequently do, go much farther both to give *and withhold* relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. *Pennsylvania v. Williams*, 294 U.S. 176, 185; *Central Kentucky Gas Co. v. Railroad Commission*, 290 U.S. 264, 270-273; *Harrisonville v. W. S. Dickey Clay Co.*, 289 U.S. 334, 338; *Beasley v. Texas & Pacific Ry. Co.*, 191 U.S. 492, 497; *Joy v. St. Louis*, [138 U.S. 1,] 47; *Texas & Pacific Ry. Co. v. Marshall*, 136 U.S. 393, 405-406; *Conger v. New York, W. S. & B. R. Co.*, 120 N. Y. 29, 32, 33; 23 N. E. 983. [*Virginian Ry. v. System Federation 40*, 300 U.S. 515, 552 (1937) (emphasis added). *See also United States v. First National City Bank*, 379 U.S. 378 (1965) and cases cited therein at 383.]

This principle was applied in *Blair v. Freeman*, 125 U.S.App.D.C. 207, 370 F.2d 229 (1966) which involved a marketing regulation of the Secretary of Agriculture who authorized premium payments to dairy farmers in certain locations. The payments were made from a settlement fund or equalization pool intended to apportion among producers the benefits and burdens of varia-

tions in the fluid milk market. One side effect of the Secretary's order was to reduce statutorily mandated uniform minimum prices received by other farmers not in the specified geographical areas; and this adversely affected group sought a declaratory judgment and an injunction restraining enforcement of the regulation. The trial court dismissed the complaint and the United States Court of Appeals reversed and granted declaratory and injunctive relief but excluded the possibility of refunds [12] for the following reason:

> Appellants have invoked the aid of equity in seeking a declaration of their rights and the prevention of further interference with them. We are concerned lest a declaration of invalidity in the context of such an action be deemed to require refund of moneys illegally paid and received under an invalid order. A court of equity may tailor its relief with a critical and balanced view of the ramifications of its decision, including in the overall public interest a consideration of the interests of those not before the court. [125 U.S.App.D.C. at 217, 370 F.2d at 239 (footnote omitted).]

In treating the refund issue, the court considered a variety of factors including the complexity of the recoupment and refund process, the large sums of money and large number of farmers involved, the long delay in filing suit, the difficulty in determining if the plaintiffs

[12] The court recognized that litigation as to refunds was imminent because the appellants' interest in the settlement fund was sufficient to confer standing for such a suit and because the appellants had sought an order requiring an escrow pendente lite. 125 U.S.App.D.C. at 217 n.39, 370 F.2d at 239 n.39.

had received offsetting advantages from other aspects of the equalization system, and the fact that the court was convinced that under all of the circumstances "the producers benefited are not necessarily to be held to account for an ultra vires action taken by the Secretary in what he conceived to be the public interest." 125 U.S.App.D.C. at 217, 370 F.2d at 239 (footnote omitted).

We do not mean to say that these considerations are dispositive of the issue before us, or even that all are relevant to the case at hand. Rather, we recite them because they demonstrate the mode of analysis which should be applied by a court of equity in cases such as this.

Prospective application of judicial decisions is a practice often followed, particularly where retrospective operation of a decision would create economic hardship which would outweigh the beneficial effect of retroactivity.[13]

In *Southern Pacific Co. v. Cochise County*, 95 Ariz. 395, 377 P.2d 770 (1963) (en banc) it was held that while real property taxes based on discriminatory assessments had been illegally collected from a taxpayer railroad, only prospective injunctive relief would be granted [14] because "[t]he refund which appellant seeks

[13] This doctrine is sometimes applied when a decision overrules prior law or regulation. *See, e.g., Safarik v. Udall*, 113 U.S.App.D.C. 68, 304 F.2d 944, *cert. denied*, 371 U.S. 901 (1962); *Arizona State Tax Comm'n v. Ensign*, 75 Ariz. 376, 257 P.2d 392 (1953); *State v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963).

[14] Unlike the situation here, the practices complained of in *Southern Pacific, supra*, had existed openly for many years with only perfunctory protests from the affected taxpayer. We do not believe, however, that the factual difference is a

together with other similar claims threatens the financial solvency of many taxing units of the state. . . ."[15] 95 Ariz. at ——, 377 P.2d at 778. Significantly, the court so held despite the fact that the taxpayer relied upon a statutory provision which allowed for refund of illegally collected taxes. On this point, the court said:

> The State's grace does not extend to its own destruction. Clearly this was not within the contemplation of the legislature in the enactment of the refunding statute. [95 Ariz. at ——, 377 P.2d at 778.]

In their presentations both here and in the trial court, appellees have stressed that the District's treatment of this matter, although perhaps well intentioned, was not characterized either by candor or adherence to principles of good fiscal management, but this does not justify the granting of refunds. However erroneous such practices have been found to be, they cannot, consistently with the objects of equity jurisprudence, be viewed in isolation

---

significant one. Although the Arizona Supreme Court was critical of the inaction on the part of the railroad in the face of long-standing discriminatory assessment, the refunds sought were for only one-half of one fiscal year (rather than for the entire period of discrimination) and the decision not to grant refunds was based on that demand, which "together with other similar claims" posed a threat to governmental stability.

[15] Although refunds were not at issue, much the same considerations were taken into account by the three-judge district court in *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971). In that case, Alabama's ad valorem property tax program was held discriminatory and unconstitutional but expressing concern about the fiscal impact of its decision, the court allowed the Commissioner of Revenue up to one year from the date of its opinion to equalize assessments. *Id.* at 625.

or without regard to the practical consequences which the requested retrospective relief would have. This court is confronted with the task of attempting to reconcile competing claims to equity, these being the financial interest of the assumedly wronged appellees on the one hand, and the financial interest of the District of Columbia as it relates to all of the people whom it serves, on the other hand.[16]

Appellees represent to this court that an average of $41 per taxpayer is at stake here and that the aggregate refunds sought in this particular litigation would amount to from $1.1 million to $1.6 million.[17] Appellees state that the total refund amount would be insignificant in light of the District's budget of approximately $1 billion, and that the District has recently foregone greater sums by voluntarily reducing the debasement factor applied to commercial property from 65% to 55%.

We do not agree. The sums at issue here are not insignificant by any realistic standard, whether absolute or relative; and this decision may be considered to have precedential effect in future class action tax refund cases.

The funds collected for fiscal year 1973 have already been disbursed for governmental purposes which have benefited all of the citizens of the District of Columbia and the refunds sought here would have to be financed

---

[16] Another implication of appellees' arguments has been that they seek by means of this suit to serve a general interest in good government by encouraging fairness and openness on the part of officials of the District. We believe, however, that this interest has been vindicated by the result in *Green*.

[17] Appellees' estimates below were an average refund of approximately $50 per taxpayer, with some as little as $10 or less and a total of $1.5 to $1.75 million.

through increased taxes or decreased services. It has been stated in a somewhat similar situation, that

> [a]s government is dependent on taxation for its maintenance, the local subdivision that levied the illegal or unconstitutional tax would have to tax the taxpayers to raise the necessary money to return to them the illegal or unconstitutional tax collected. In other words, the taxpayers would have to be paid the illegal tax, paid by them, out of their own pockets. Such a ceremony would be idle and vain. [*Dupre v. City of Opelousas*, 161 La. 272, ——, 108 So. 479, 481 (1926).]

Thus, not only did the taxpayers not pursue the statutory procedures, but under these particular circumstances the adverse impact of refunds on the entire citizenry of the District outweighs the economic interest of the property owners who paid the taxes at issue.[18]

Appellees in this case have come to the courts seeking equity but equity has already been done by the first *Green* case, *supra*, where a mandatory injunction was affirmed despite this jurisdiction's anti-tax injunction statute. D.C. Code 1973, § 47-2410.[19] After a balancing

[18] The second opinion of this court in *District of Columbia v. Green*, D.C.App., 348 A.2d 305 (1975) is not to the contrary. Our decision there was simply an implementation of the first *Green* case (310 A.2d 848 (1973)) and it did not run to tax refunds for a prior fiscal year.

[19] D.C. Code 1973, § 47-2410: "No suit shall be filed to enjoin the assessment or collection by the District of Columbia or any of its officers, agents, or employees of any tax." Injunctive relief notwithstanding the existence of an anti-tax injunction statute is not entirely unprecedented, but it may be granted only in the most exceptional and stringent circumstances. *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974); *Enochs v. Williams Packing and Navigation Co.*, 370 U.S. 1 (1962).

of all interests in this case, we conclude that the public interest would be disserved by a grant of the refunds sought. In *Green*, we went as far as equity requires us to go and so we will not go further here.

While application of the principles of equity occasionally may be appropriate in tax litigation (*e.g., Green*) it would hardly aid the financial stability of this city if this court were to relax the statutory requirements of our Code as they relate to tax litigation and superimpose equity jurisprudence on these statutory requirements. This should be done only in a rare case (*e.g., Green*). Otherwise, financial instability would be promoted. Tax statutes are necessarily formalistic and often technical. It is essential that we adhere to their technicalities, even if at times a seeming hardship results to the taxpayer. *See, e.g., George Hyman Construction Co. v. District of Columbia*, D.C.App., 315 A.2d 175, 178 (1974). Among other things, fiscal considerations require that this be done. Where class action tax refunds for fiscal years in the past are at issue, the relief sought would not emanate from some inexhaustible treasury. The reality is that the funds could only be supplied by an additional tax on innocent taxpayers,[20] or the reduction of services, in an already financially beleaguered city. Only in extraordinary circumstances, not here present, should the equity relief sought be afforded.

Accordingly, the judgment of the trial court is

Reversed with instructions to dismiss the complaint.

[20] This would include taxpayers in the class here seeking relief.

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

ARTHUR H. KEYES, JR., et al.,	:	
	:	
Petitioners	:	
	:	
v.	:	NO. 2214
	:	
THE DISTRICT OF COLUMBIA, et al.,	:	
	:	
Respondents	:	

OPINION AND ORDER

This matter is before the Court pursuant to the action denominated as Taxpayers' Suit for Refund of Tax for Fiscal Year 1973 Illegally Assessed which, in essence, seeks refunds for approximately 34,000 persons owning single-family residential property in the District of Columbia (including residential garages and vacant land zoned for single family residential use).

It is alleged that these 34,000 persons were taxed, and paid their taxes, for Fiscal Year 1973 at a level of assessment

(debasement factor) of 60 percent of estimated market value and that these taxpayers should be assessed for taxation at the same level of assessment (debasement factor) of 55 percent of estimated market value as were assessed some 62,378 other owners of single-family residential property in the District of Columbia for the same Fiscal Year 1973.

The Petitioners aver that fixing a level of assessment for real property is rule-making within the meaning of the District of Columbia Administrative Procedure Act and that failure to give notice to the District of Columbia single-family residential property owners that the level of assessment of their properties was in the process of change, deprived the taxpayers of the due process afforded by the D.C.A.P.A. and invalidated the increased taxes assessed at 60% of estimated market

value.

It is also contended that the intentional and arbitrary actions of Respondents in applying unequal levels of assessment (55% and 60%) to estimated market value within the same class of single-family residential properties is violative of the Fifth Amendment rights under the Constitution of the United States of the Petitioners and others similarly situated to them.

As a result of the above, the Petitioners request refunds which are to be measured by the difference between the tax bill rendered and paid for Fiscal Year 1973 at a level of assessment of 60% of estimated market value and the tax bill as it should have been assessed for Fiscal Year 1973 at a level of assessment (debasement factor) of 55% of estimated market value, plus interest at 6% per annum.

The Respondents have answered that the petition fails to state a claim upon which relief can be granted and that this Court is without jurisdiction to hear and determine this matter; they also deny the tax bills for Fiscal Year 1973 were in any way illegally rendered, deny Petitioners can maintain this action as a class action for themselves and all others claimed to be similarly situated and deny they have violated the D.C.A.P.A. or that the taxpayers have been deprived of the due process required by the D.C.A.P.A. They do:

> "...admit that all taxpayers were not assessed at the same level of assessment (debasement factor) for Fiscal Year 1973..."1/

At the same time the taxpayers' suit was filed and Respondents answered, the District of Columbia Court of Appeals had

---

1/ Answer of Respondents, Par. 6.

yet to hear argument and render decision, on an expedited basis, in Green, et al v. District of Columbia, et al., D.C.App., 310 A.2d 848 (1973). Accordingly, in a motion to place the instant case upon the reserve calendar pending the Green decision, Respondents referred to Petitioners' contention that the present case involves the same Respondents and similar Petitioners and a claim of res judicata for facts and questions of law decided June 29, 1973 in Green, and said that "[w]hen a decision is rendered by the appellate court, this case may be governed by that decision."

Thereafter, Respondents moved to extend the time in which to file their response to Petitioners' Motion to Submit Case Without Trial until 30 days after final decision was reached in Green, supra.

> "...According to Petitioners, the final decision on that appeal would be res judicata of the present case for both facts and questions of law. Thus, in accordance with Petitioners' premise, until that case is finally decided it would be undesirable for this Court to require an answer to Petitioners' Motion..."

After the appellate decision in Green, although specifically stating they had no objection to the Green trial record becoming part of this Keyes trial proceedings, the Respondents formally opposed Petitioners' Motion to Submit Case Without Trial because:

> "Respondents herein wish to proffer to this Court the testimony of witnesses to fully present the assessment system used by the District for purpose of real property taxation for Fiscal Year 1973."2/

> "While the District of Columbia presented explanations in a trial

---

2/ Par. 2 of Opposition to Petitioners' Motion to Submit Case Without Trial.

> before this Court in Clarzell Green, et al. v. District of Columbia, et al, D.C. Tax Court Case 2213, District of Columbia Court of Appeals 7539, it was limited in its amplification of the tax assessment methods because the hearing was conducted as an expedited proceeding."3/

Also, Respondents contended that, absent certain unspecified procedures to be followed by Petitioners in order that the matter be handled as a class action, those procedures entered in a case before another Judge of this Court could be followed in this one.

The Respondents claimed that it did not admit facts averred by the Petitioners nor did they stipulate to any facts.

In consideration of the above on November 21, 1973 this Court denied Petitioners' Motion to Submit Case Without Trial and set the trial date, alterations of which have resulted for several reasons.

3/ Par.3 of Opposition to Petitioners' Motion to Submit Case Without Trial.

Subsequently, for the convenience of the litigations and also in light of the Court's other and continuing judicial obligations,4/ it was agreed between counsel and the Court that there would first be a determination of the Petitioners' plea of res judicata or collateral estoppel by judgment, and Respondents' Opposition to same, prior to the commencement of testimony, if any, in this cause. If the Court agreed with Petitioners' contentions, a hearing with accompanying testimony and documentation would become unnecessary. If the Court agreed with Respondents' position, the hearing would be scheduled to completion with temporary suspension of the Court's other responsibilities.

Accordingly, Petitioners filed their

4/ Felony II assignment through January 1974;
Arraignment Court for February 1974;
Misdemeanor Trials for March 1974;
Preliminary Hearings for April 1974.

Motion for Judgment on the grounds of collateral estoppel by judgment or res judicata and Memoranda of Law in support thereof. The Respondents have filed their Opposition in the nature of a Memorandum and oral argument was heard on the 5th of March 1974.

The Court agrees with the Petitioners, as expressed in their oral argument, that the principle of collateral estoppel, not the principle of res judicata, is applicable here. Lawlor v. National Screen Service Corp., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955), relied on by both parties, well defines the effect of the doctrine of collateral estoppel.

> "The basic distinction," said Chief Justice Warren, "between the doctrines of res judicata and collateral estoppel, as those terms are used in this case, has frequently been emphasized. Thus, under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a

> second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit."

See, also, Tutt v. Doby, 459 F.2d 1195 (1972), 148 U.S.App.D.C. 171.

In the classic case of Cromwell v. County of Sac,[5/] illustrating the distinction between the direct effect of a judgment as res judicata and its collateral effect, Justice Field stated:

> "...where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the in-

5/ 94 U.S. 351, 352-353, 24 L.Ed. 195 (1877).

> quiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The principle of collateral estoppel embraces matters both of fact and law, and it is clear that one must look to the pleadings forming the issues and must examine the record for a determination of the questions essential to the decision of the earlier litigation:

1. Whether the issue sought to be concluded is the same as that involved in the prior action?

2. Was the issue litigated in the prior action?

3. Was the issue judicially determined in the prior action?

4. Whether the judgment in the prior action was dependent upon the determination made of the issue?6/

6/ Cf. United Shoe Machinery Corp. v. United States, 285 U.S.451,459, 42 S.Ct.363, 66 L.Ed. 708 (1922). If the parties could have reasonably foreseen the conclusive effect of their action, eminent authority holds the principle of collateral estoppel properly applicable. Moore's Fed. Prac.Vol.1B,§0.444; Tutt v. Doby, supra, at p.1200.

If the above questions are affirmatively answered, the issue is concluded under the doctrine of collateral estoppel.

Or, to put it another way: the essence of collateral estoppel by judgment is that some fact or question in dispute has been judicially and finally determined by a court of competent jurisdiction between the same parties or their privies. If the second action involved a different claim, different demand or different cause, the judgment in the first suit operates as a collateral estoppel only as to those matters which were in issue or controverted and upon the determination of which the original judgment necessarily depended.

As noted, the doctrine of collateral estoppel is operative where the second action is between the same persons who were parties to the first action.

"A judgment for the plaintiff

in the first action may have the effect of enabling him to recover in the second action without proving the facts constituting his cause of action, provided that those facts were litigated and determined in the prior action; but the defendant is not precluded from defending the second action on grounds not litigated and determined in the first action."7/

These rules are also applicable

> "...to periodic taxes, such as successive income taxes or property taxes. If in an action between the taxing authority and the taxpayer an issue of fact is litigated and determined by a judgment with reference to the tax on one year, the determination is conclusive if the same issue is raised between the taxing authority and the taxpayer with reference to the tax of a subsequent year."8/

The doctrine of estoppel by judgment has long been applied in the Federal

7/ Restatement of Judgments (1942) §68a, at p. 295.

8/ Restatement of Judgments (1942) §68c, at p. 299.

Courts in the tax field. The case of Com'r. v. Sunnen,9/ (concerning federal income tax consequences of intra-family assignments of income) held that a prior income tax judgment is res judicata only in

> "...a subsequent proceeding involving the same claim and the same tax year",

and confined the doctrine of collateral estoppel to

> "...situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged."10/

With application of the doctrine of res judicata it has been repeatedly held that the parties are concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respect-

9/ 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948).

10/ Com'r. v. Sunnen, supra, 333 U.S. 591, 599-600.

ing the tax of an earlier year. City of New Orleans v. Citizens' Bank, 167 U.S. 371, 17 S.Ct. 905, 42 L.Ed. 202:

> "It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed." (at p. 398)

Compare, also, among others, Tait v. Western Maryland Ry. Co., 289 U.S. 620, 53 S.Ct. 706, 77 L.Ed. 1405; Deposit Bank v. Frankfort, 191 U.S. 499, 24 S.Ct. 154, 48 L.Ed. 276.

By application of collateral estoppel both the government and the taxpayer are relieved of "redundant litigation of the identical question of the statute's application to the taxpayer's status."[11/]

11/ Tait v. Western Maryland Ry. Co., supra, at 624.

Collateral estoppel attempts to preclude the repeated controversy of matters once judicially determined, aiming for judicial finality. It is considered

> "...a reasonable measure calculated to save individuals and courts from the waste and burden of relitigating old issues."[12/]

Compare the applicability of collateral estoppel to criminal proceedings as an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. Once an issue of ultimate fact has been determined by valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit, Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469; Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971).

12/ Tillman v. National City Bank of New York (CCA 2d, 1941) 118 F.2d 631, 634, cert. den. (1941), 314 U.S. 650, 62 S.Ct. 96, 86 L.Ed. 521.

Even when the precise question for determination in a second action (automobile operator-host's negligence versus his passenger) has not been litigated in a technical sense, where the factual and legal issues in the two actions (passenger v. host and motorist; other motorist v. host) are

> "...so interrelated that the result in General Sessions [denying recovery to the host against the other motorist on the ground that both parties were negligent] is properly dispositive of the subsequent action for contributions." Brightheart v. McKay, 420 F.2d 242, 136 U.S.App.D.C. 400 (1969):
>
> "...The critical question in the application of collateral estoppel is whether the parties have had a full opportunity to litigate the issue on which they are estopped...Here, estoppel is invoked as against the person who initiated the action in General Sessions as plaintiff. There is every reason to believe he exerted his full energies to obtain recovery, and sought to avoid any determination of negligence on his part..." (fn. 4)

In its dual function of protecting the public interest in sound judicial administration and protecting litigants against needless, oft-times oppressive, court action, collateral estoppel attains the end result desired: final, but just, determination of every suit.

Respondent's contentions that they now wish to "fully" present the District's assessment system, although they "presented explanations" in the Green trial echoes the refrain sounded by appellant in Tait v. Western Maryland Ry. Co., supra. Tait's appellant argued that the Circuit Court of Appeals:

> "...might well have reached a different result on the merits, if the former case had been more fully and accurately presented."

The Supreme Court disagreed, holding:

> "...the very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding

> ...The [appellant] may not escape the affect of the earlier judgment as an estoppel by showing an inadvertent or erroneous concession as to the materiality, bearing or significance of the facts, provided, as is the case here, the facts and the questions presented on those facts were before the court when it rendered its judgment..."

It has been held by the Maryland Court of Appeals that where it was determined that the taxpayer (a military preparatory school) was entitled to a tax exemption for the year 1950 for certain land by reason of its use for educational purposes, the doctrine of estoppel by judgment was applicable to a claim for a tax on the same properties against the same parties for another tax year (1954). State Tax Commission for Maryland v. Bullis School, Inc., 218 Md. 558, 147 A.2d 849 (1959). In the Bullis case appellee had made a proper showing to establish a tax exemption for the year 1950 which necessitated a finding that the property's use

was for educational purposes entitling an exemption under the appropriate Maryland statutes. Since the original case there was

> "...no material change in the law, the parties and the property are the same as in the present case, and the only testimony taken...showed that the use of the property for the taxable year 1954 was the same as in 1950."

Since the Maryland appellate court could find no questions to be determined in the second action that were not fully litigated in the original case, it affirmed, with costs, holding that the doctrine of estoppel by judgment was properly applied by the court below.

Determination in the case of Green, et al. v. District of Columbia, et al., D.C. App., 310 A.2d 848 (1973), was made after numerous pretrial motions and rulings, substantial discovery (primarily by depositions and computer runs), a full hear-

ing lasting five days, extending over approximately 1,000 pages of transcript, detailed findings of fact and conclusions of law rendered in a 60 page Opinion and Order,[13/] and terminating in a comprehensive 16 page Court of Appeals affirmance,[14/] which, as does the trial court's Opinion and Order, discusses at length the history of real property tax assessment in the District of Columbia. Findings and conclusions are made both in the trial and appellate courts concerning not only Fiscal Year 1974 (the Green case enjoined Respondents from unequally assessing a certain class of taxpayers for Fiscal Year 1974) but also concerning Fiscal Year 1973.

13/ Wash. L. Rep., Vol. 101, No. 172, p. 1737; No. 173, p. 1749; No. 174, p. 1761 (1973).

14/ Green, et al. v. District of Columbia, et al., D.C.App. 310 A.2d 848 (1973).

The Keyes suit claims refunds for Fiscal Year 1973 based on precisely the same substantive issues that confronted the Green trial court:

1. Whether the level of assessment used to determine the assessed value of single-family residential real properties in the District of Columbia was increased from 55 percent of estimated market value to 60 percent of estimated market value in violation of the "rule-making" provisions of the District of Columbia Administrative Procedure act?

2. Whether failure of the taxpayers to timely avail themselves of, and exhaust, administrative remedies precludes the [refund] relief now sought?

3. Whether the relief sought for petitioners should be granted for the benefit of all owners of single-family residential real property in the District of Columbia?

4. Whether unequal levels of assessment (55 to 60 percent of estimated market value) were used for single-family residential properties in the same tax year in violation of the Fifth Amendment to the Constitution of the United States?

As they originally did in the Green case, Respondents contend in the Keyes case that the petition fails to state a claim upon which relief can be granted; that this Court is without jurisdiction; that the tax bills rendered for Fiscal Year 1973 were in no way illegally rendered; that this matter is not maintainable as a class action. The Respondents further deny that they have violated the District of Columbia Administrative Procedure Act or that the taxpayers have been deprived of the due process required by that Act.

It must be noted that when Respondents' Answer to Keyes was filed the Green decision still pended. Subsequently, three months after the Green decision, Respondents filed their Opposition to Motion for Judgment on the Grounds of Collateral Estoppel by Judgment or Res Judicata and on March 5, 1974 presented oral argument

as to this matter. In both their written and oral argument, after the Green decision, Respondents concede that a class action might be appropriate but only if done in some unspecified manner:

> "We have a class action. Fine. We're not contesting that this may very properly be. We're saying if we have a class action, let's do it properly. And let's do it, since we're doing it with refunds, let's do it in a way...that that will close the question once and for all." (transcript of proceedings, Mar. 5, 1974, p. 13,14)

It is difficult, however, to comprehend Respondent's position, which slips and slides, dependent on whether it was formulated in pleadings before the Green decision or in written/oral argument after the Green decision. To wit:

Respondents are not objecting to Petitioner's attempt to have this case tried as a class action--

> "...[but] failure to have this case properly certified as a

> class action may work to the detriment of respondents should they prevail .." (p. 6, Respondent's Opposit on to Motion for Judgment on the Grounds of Collateral Estoppel by Judgment or Res Judicata).

Yet, in the very same paragraph, Respondents state that "in no way [do they] waive any objections that they may make at such time as a proper motion to certify this case as a class action is filed with the court."

In an incredible position, the Respondents contend, three months after the appellate decision in Green, that:

> "Respondents note that they are not certain that all single family residential property represents a class in a refund suit and suggest that certain questions such as whether each single family residential property is in fact solely occupied by the owner, or is rental property, or, although occupied by the owner has income producing units therein, may well have to be addressed by the Court at such time as a proper motion is filed."

Even though the Court of Appeals[15/] refers over and again to the "single-family residential class" (p. 854), "same class of property (residential taxpayers)," (p.855), "same class" (p. 855), "one class of real property"; "single family residential property and other classes of real property"; "one class of single-family residential property owners", "single class of residential property owners" (p. 857), Respondents are "not certain that all single family residential property represents a class in a refund suit", and, in effect, would require some 34,000 separate hearings to determine answers to the questions they pose above.

Nowhere now, as to defenses, as to new

15/ Green, et al. v. District of Columbia, et al., supra.

questions of fact, do Respondents claim that the merits of the matter would entitle them to prevail on the fiscal year assessment and taxes. In effect, all they say is that new sales assessment ratio studies concerning Fiscal Year 1973 have been performed since the Green trial. They say further, through their attorney, that:

> "The District of Columbia has no intention of attempting... to have the District rehash the facts that were proven in the previous case...the District was not and did not see fit to put on testimony in depth and detail with regard to a claim for refund...[the Green case was an injunction suit concerning Fiscal Year 1974]...finding that this was an impermissible...level of assessment, with regard to certain householders,...this does not ipso facto give rise to a refund...there is an entirely different body of law that is involved..."

And, later, continuing the same argument in generalities:

> "I will state...that under the facts as already established and

> under the additional facts that the District of Columbia wishes to put before the court with regard to Fiscal Year 1973 that under the overwhelming majority law in the United States of America, the petitioners are not entitled to a refund of taxes for Fiscal Year 1973, whether they be brought in individual cases or whether they be brought in the form of a class action." (transcript of oral argument, Mar. 5, 1974, at pp. 21-22)

Let us, therefore, look to see what Respondents have conceded by virtue of their prior pleadings or briefs, and what has been decided by the Court in Green, et al. v. District of Columbia, et al., which may permit or preclude the use of the doctrine of collateral estoppel.

Respondent's trial brief, filed in the Green case, on June 23, 1973, is clear:

> "In calendar year 1971, the level of assessment was raised from 55% to 60% on approximately one-third of single family residential properties

for FY 1973;..." (p. 31)

In the trial court's Opinion and Order in the Green case it stated as follows:

> "In fiscal year 1973 there were 37,290 changes of all kinds in the assessments in the District of Columbia of which approximately 34,193 (99.61%) were attributable to changes in single family residential property levels of assessment.
>
> "In fiscal year 1974 there were 45,364 changes of all kinds in the assessments in the District of Columbia, of which approximately 40,056 (88.3%) were attributable to changes in single family residential property levels of assessment." (Trial court's Opinion and Order) Wash. L. Rep., Vol. 101, No. 173, at p. 1749.

The taxpayer received and paid his tax bill on real property in the same manner in Fiscal Year 1973 as he was required to do for Fiscal Year 1974. (See Opinion and Order in Green detailing these steps, Wash. L. Rep., Vol. 101, No. 173, at p. 1749.)

The Court of Appeals expostulated in

detail the way an individual real property owner's tax liability was formulated. Upon receipt of a tax bill there were appeal procedures for an unhappy taxpayer, first by complaint to the Board of Equalization and Review and, subsequently, by appeal to the Tax Division of the Superior Court.

> "...in a planned cyclical reassessment program, conceived and orally implemented by the Director of Finance and Revenue, the level of assessment for approximately 33,000 single-family residential properties was changed from 55% to 60% for Fiscal Year 1973, and, in preparing the tax rolls for Fiscal Year 1974, an additional 44,485 single-family properties were debased at 60%..."

The Green case further developed that the public disclosure of the heretofore secretive unequal assessment raises came in June 1973, "far too late to afford the customary relief to approximately 77,485 single-family residential real property taxpayers who are being assessed at 60%

..."

For example,

> "Arthur Keyes, Jr., testified that he did not know the market value of his property ($77,600 remained the same when he received his notice of increase of assessment from $42,682 to $46,560 in calendar year 1971 effective fiscal year 1973). He was also neither aware nor advised that the entire increase came about as the result of a change in the level of assessment from 55% to 60%." (Order and Opinion, Wash. L. Rep., Vol. 101, No. 172, at p. 1741)

It is now settled that the fixing of a level of assessment for real property is rulemaking within the meaning of the District of Columbia Administrative Procedure Act, and it was undisputed in Green that no rules governing the method of assessment of real property have been published. Interpretation or explanation of the words "full and true value" contained in §47-713 of the Code was a rule within the

meaning of the District of Columbia Administrative Procedure Act and its formulation was rulemaking. Accordingly, for a number of years the meaning of "full and true value" of single-family residential properties had been 55% of estimated market value (i.e., 55% debasement factor). This was an unpublished rule. The Court of Appeals, in Green, has held that a change in the debasement factor is rulemaking within the meaning of the District of Columbia Administrative Procedure Act, which must be published with an opportunity for a public hearing.

The District

> "...chose to apply different debasement factors to the same class of property in the same year and, in so doing, denied the [taxpayers] equal protection of the laws by discriminating among residential taxpayers."

It is clear that in Keyes, as in Green, even if the taxpayer had known about the

disparity of the level of assessment, he would have had no chance to successfully challenge his assessment, since the increased debasement factor (55% to 60%) was arbitrarily determined and inflexible. It was not a subjective art, such as is appraisal.

> "The lack of equalization [between taxpayers owning identically valued properties with different assessments] [was] caused by an intentional and arbitrary application of two different debasement factors to identical properties."
>
> "...evidence before the trial court demonstrated the assessments in years where the 'stair steps' were being used caused assessment increase that went above and beyond the increases that would have been caused by property appreciation alone. This should be no surprise, for any raise in the debasement factor must raise the assessment. ...the facts of this case have highlighted the importance to the taxpayer of an accurately stated fair market value; it is the only element in the tax formula to which he can meaningfully object. If real increases in his property assessment are disguised in the form of a higher debasement factor, he is totally remediless within the normal avenues for seeking redress."
>
> "...the District cannot now be heard to say in this appeal that in attempting to cure the one allegedly discriminatory method of assessment between single-family residential property and other classes of other real property it can in the process deliberately discriminate between members within the one class of single-family residential property owners..."16/

The Opinion and Order discussed (Wash. L. Rep., Vol. 101, No. 173, p. 1753) the above oral directive to change the level of assessment for single-family residential real properties from 55% to 60% "for all those properties reviewed commencing in calendar year 1971 (for fiscal year 1973) and for calendar year 1972 (for fiscal year 1974)." (Emphasis supplied.) It was admitted in Green that the Finance

16/ Green, et al. v. District of Columbia, et al., supra, at pp. 856, 857.

Director's "policy goal" of 65% was never put into written form and when he ordered the Fiscal Year 1973 level of assessment (debasement factor) he did not publish this change or give public notice or other written notice to the taxpayers.

> "As a result of this, and beginning in calendar year 1971 (notices were mailed out to taxpayers between November 1, 1971 and March 1, 1972, but the assessors' work was accomplished in calendar year 1971 (for fiscal year 1973)) the bills sent out in September 1972 to approximately 34,000 (or to 1/3 of these taxpayers, Respondents contend) of the 96,378 single family residential properties had their level of assessment changed from 55% to 60% of estimated market value.
>
> "In calendar year 1972, for fiscal year 1974, approximately 40,000 more (or to approximately 1/2 of these taxpayers, Respondents contend) single family residential properties had their level of assessment changed from 55% to 60% of estimated market value.
>
> "Presently, 18,893 single family residential properties remain at the 55% level of assessment.

> "The assessment increases in both fiscal years 1973 and 1974 for single family residential properties were represented to the public as increases in property value. But, in fact, the changes of assessment in fiscal year 1973 were due, in over 90% of the cases, solely to a rise in the level of assessment. In fiscal year 1974 about 50% of the rise was due to increases in property value and about 50% to rises in the level of assessment from 55% to 60%.
>
> "Using data derived during testimoney and, in particular, from the Respondents' own figures and projections17/ the following information was obtained for fiscal years 1973 and 1974
>
> | | |
> |---|---|
> | "Total increased assessment single family residences fiscal year 1972-1974 | $203,794,400 |
> | "Increased assessment single family residences fiscal year 1972 - 1974 due to increase from 55% to 60% in the level of assessment ("debasement factor") | $113,713,800 |

17/ Testimony of John E. Rackham, using the records of D.C. Department of Finance and Revenue.

"Increased assessment single family residences fiscal year 1972 - 1974 due to increase in market value (estimated market value) $ 96,080,600[18/]

"This exhibit demonstrates that, as a result of these acts of the District of Columbia in raising the level of assessment (debasement factor) for two years for part of the single family residential properties from 55% to 60%, the assessment of that class of property was increased by $113,713,800 out of a total assessment increase in the same two year period of $209,794,400. The substantial nature of the effect of this change in the level of assessment over this two year period is evident." (Emphasis supplied)

During the trial, in the Green case, the Respondents admitted that in calendar year 1971 (for Fiscal Year 1973), as well as for calendar year 1972 (for Fiscal Year 1974) all changes in assessments were computed at a level of assessment at only 60%, except for minor administrative error.

18/ This was Petitioners' Exhibit 43 in the Green case.

Accordingly,

"[t]he net result of these intentional acts was that in fiscal year 1973 the level of assessment was raised for approximately one-third of the taxpayers of this category--"class" of 96,378 single family residential properties (excluding garages). (see Wash. L. Rep., Vol. 101, No. 174, p. 1764, for Opinion and Order)

An assessor-witness testified that "poor" neighborhoods were assessed in Fiscal Year 1973, and when the estimated market value was reduced for the Fiscal Year 1973, then the level of assessment was raised from 55% to 60%.

It was pointed out in Green, that in Fiscal Year 1973 whole neighborhoods were assessed from 55% to 60% level of assessment, even those with less than 20% of changes in the estimated market value. Old City and Kalorama were illustrative.

As Assessor Beal testified in the Green trial: He accomplished assessing

approximately 2,000 single family residential properties there for the Fiscal Year 1973. There were a "lot of decreases" [in estimated market value] and a "majority of increases". Probably "all" of the 2,000 properties assessed in Fiscal Year 1973 were changed; "I do not think any did not go to 60%. However, some may have kept the same estimated market value." Whether the estimated market value was reduced or increased made no difference: the level of assessment would still be 60%. (Wash. L. Rep., Vol. 101, No. 174, p. 1765).

Therefore, it was found that those taxpayers who by-passed the Board of Equalization and Review could not have known of the changed level of assessment until June 1973 and were, accordingly, denied viable access to the statutory administrative procedure within the permissible time. In any event, under the extraordi-

nary circumstances of the case, there was, in reality, no effective administrative remedy and any appeal thereto would have been useless. "The evidence of record supports the finding of the trial court..."19/

> "When the assessment is void, the taxpayer must resort to equity for relief, without following statutory remedies...", citing Tumulty v. District of Columbia, 69 App.D.C. 390, 399-400, 102 F.2d 254, 263-64 (1939).

How could the taxpayers in Keyes complain timely to the Board of Equalization and Review of an increase in their Fiscal Year 1973 real property tax assessment (from 55% to 60%) when they were clearly unaware of any raise in the level of assessment, and when they were unaware of two levels of assessment existing for the same class of single-family residential properties. Just as in Green, they were

19/ Green, et al. v. District of Columbia, et al., supra, at p. 853.

effectively denied an adequate administrative and legal remedy.

Respondents contend this Court is without jurisdiction to entertain the present action. The Court completely disagrees and cites Green for authority. It would be unbelievable to have jurisdiction to enjoin an invalid, void, unconstitutional, arbitrary, invidious tax assessment for one fiscal year (1974); yet require detailed, duplicative testimony, at substantial waste of taxpayers' additional monies to pay for the presentation of testimony, covering identical matters, for Respondents suggested 34,000 individual hearings, to consider whether or not the issues previously presented in Green for Fiscal Year 1974 are the same issues germane to a determination of Keyes for Fiscal Year 1973.

As the trial court said in Green,

"Should the Court adopt Res-

pondents' argument it would, in effect, add yet another dimension of inequity to a situation already surrounded by unfairness, secrecy and lack of candor. It would be tantamount to telling a taxpayer that he must pay thousands of dollars and that he must yield days, weeks and months of his effort to develop testimony and documentation at his individual high expense to reap, in return, a few dollars in the majority of cases (and hundreds or more of dollars in other cases) just to have the right to present constitutional argument and to exhibit that which is already before this Court. Would not this attitude in and of itself be a coercive device on the taxpayers to not pursue their due remedies because of financial and time inability?"

The Court has gone into great detail [and has avoided the temptation to cite substantive and further examples] to illustrate the multiple reasons the Court finds that the principle of collateral estoppel is significantly appropriate to the Keyes case. Accordingly, there shall be no testimony taken in the Keyes tax case.

Respondents pray the opportunity to plead the law applicable to refunds in general and to this case in particular. Petitioners had earlier requested the Court fix a time for filing briefs and for oral argument. Both requests were made prior to the written and oral argument concerning the applicability of collateral estoppel, which necessarily embraced--at least in part--the law pertaining to refunds. Nevertheless, fairness dictates that the parties have the full opportunity, if they still so desire, to develop in writing their respective positions concerning applicable law before a final determination of this case. [There shall be no further oral argument thereon.]

Accordingly, if the parties, or any of them, wish to file written briefs (optional as far as the Court is concerned) they may do so, as follows:

Petitioners to file written brief, if any, on or before May 6, 1974; Respondents to file written brief, if any, on or before May 16, 1974, following which the matter shall stand submitted.

/s/ Joyce Hens Green
Joyce Hens Green
Judge

April 25, 1974

Copies to counsel of record.

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

ARTHUR H. KEYES, JR., et al., :

Petitioners :

v. : NO.2214

THE DISTRICT OF COLUMBIA, et al., :

Respondents :

OPINION AND ORDER

For fullest comprehension and compliance this matter must be considered in context with the Court's detailed Opinion and Order of April 25, 1974[1/] holding the principle of collateral estoppel significantly appropriate to the instant case as a result of Green, et al. v. District of Columbia, et al., D.C. App., 310 A.2d 848 (1973).

Counsel had requested the opportunity to file written briefs which have since

1/ Wash. L. Rep., Vol. 102, No. 99, p.1029, (1974).

been filed and considered.

There are questions of law or fact common to the members of this class of taxpayers, including equal protection under the Fifth Amendment to the Constitution of the United States and the statutes of the District of Columbia, which predominate over any questions affecting only individual members, and a class action would be superior to other available methods for fair and efficient administration of the controversy. Members of the class on behalf of whom petitioners sue are so numerous that joinder of all members is impracticable. The claims of petitioners are typical of and applicable to the claims of all members of the class and petitioners have fairly and adequately represented and protected the interests of all members of the class. Prosecution of separate actions by members of the class would create a

risk of inconsistency or varying adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members of the class not parties to the adjudications.

Nevertheless, Petitioners' action does not require certification as a class action and notice to its members. Separate rules have been adopted by the Board of Judges for civil actions and for tax actions, and the Tax Division has neither adopted nor incorporated by reference the Civil Division class action Rule 23 or any other rule pertaining to class actions.

The facts in this case, as in Green, supra, are so exceptional and extraordinary as to merit extraordinary and exceptional relief that justice compels under the inherent and general equity powers of the Court. Accordingly, this cause is

determined as a taxpayers' suit in equity in the nature of an uncertified class action brought on behalf of the individual petitioners and all others similarly situated.[2/]

Petitioners and the approximate 34,000 other similarly situated owners of single family residential properties in the District of Columbia were taxed, and paid their taxes, for Fiscal Year 1973 at a level of assessment (debasement factor) of 60 percent of estimated market value.

2/ Crampton v. Zubrinskie, 101 U.S. 601, 25 L. Ed. 1070 (1880). Yokley, Municipal Corporations:

> "It is an essential element of a taxpayer's suit that the suit be brought in behalf of a plaintiff and other citizens and taxpayers.
>
> "A taxpayer's suit is necessarily a class action. It must be brought not by individuals, but by individuals, for themselves and for all of the citizens similarly situated." Vol. 4, Sec. 602, p.36.

Petitioners seek in the form of refunds the difference between what was actually paid by these taxpayers and what should have been paid had a level of assessment of 55 percent of estimated market value been used, plus interest at 6 percent per annum computed from the date payment was made until the date of refund.

In applicable substance, Green held that the increases in property tax assessment from 55 percent to 60 percent of estimated market value were invalid because they were based on an arbitrary, intentional, and discriminatory change by Respondents in the level of assessment (debasement factor) applied to petitioners and some 34,000 other taxpayers for Fiscal Year 1973 and not applied for the same Fiscal Year 1973 to approximately 62,378 other owners of single family residential real property in the District of Columbia. Green further held that the

changes were nullified by their creation in violation and disregard of the District of Columbia Administrative Procedure Act. The taxpayers had ". . .no meaningful ability to challenge his assessment at all"[3/] when the District choose to apply different debasement factors to the same class of property in the same year because the taxpayer was not aware that he was being treated differently from his neighbor and that he was being denied equal protection of the laws. He was therefore effectively denied his administrative remedy and his timely complaint to court.

Put succinctly, as did the Court of Appeals in Green:

> ". . .irrespective of whether the District may constitutionally differentiate in the level of assessment applied to residential real

3/ Green, supra, at p. 856.

> property as opposed to commercial real property,. . .it clearly may not do so within the single class of residential property owners." at p.857.

Accordingly, Green ordered the level of assessment for Fiscal Year 1974 reduced to 55 percent of estimated market value (by enjoining any other percentage level of assessment) until and unless a level of assessment was established after full compliance with the District of Columbia Administrative Procedure Act and further provided that only equal levels of assessment were to be used.

In summary,[4/] the Court finds that the same factors exist here as in Green: the taxpayers were deprived of due process and there has been discrimination among the citizens of the same class of single family residential properties. Some taxpayers have been assessed at 60 per-

4/ For fuller expostulation, see the Opinion and Order of April 25, 1974, Wash. L. Rep., Vol. 102, No. 93, p. 1029, (1974).

cent of estimated market value, and paid their taxes accordingly, while others in the same class were assessed and paid their taxes at 55 percent of estimated market value. This is clearly in violation of the due process clause of the Fifth Amendment to the Constitution of the United States as it applies to the Petitioners individually and to those similarly situated.[5/]

It is frequently stated that a taxpayer must pay his just share for the just and orderly functioning of his Government. It is never proclaimed that a taxpayer should pay his unjust, inequitable, disproportionate share. If he does--and errors can occur--then the (Federal) Government upon review refunds the excess, with interest. It is manifest that the municipal government should do no less. "Monies illegally exacted from a

5/ Bolling v. Sharpe, 347 U.S. 497 (1954).

citizen taxpayer by its Government must be promptly refunded. To hold otherwise would be unconscionable."

The Court concludes that the Petitioners and the approximate 34,000 others similarly situated are, upon computation of the appropriate sums, entitled to prompt refunds of the amounts overpaid, with corresponding interest, in consideration of the above invalid assessment and then collection of taxes not rightfully due and owing. The Court further concludes that Respondents, by access to the District of Columbia's data sources, tax rolls, finance department, and computers, are in an unique position to exactly ascertain and yield the information necessary from which the full and fair refund can be made.

A decision concerning counsel fees and costs will be rendered upon the final determination of the amounts to be refund-

ed to each citizen.

Having determined the issues in this matter, the Court is withholding entry of the amount of refunds due to each member of the class of single family residential real property owners whose property was incorrectly and illegally assessed at a level of assessment (debasement factor) in excess of 55 percent of estimated market value, to allow the parties, pursuant to Superior Court Tax Rule 15, to submit computations of the amounts due to each person pursuant to the findings and conclusions entered in this case.

It is therefore, this 6th day of August, 1974:

ORDERED:

(1) the [sic] the Respondents submit to Petitioners by August 27, 1974 computations of the amounts due, in accordance with the findings entered in this case, to each owner of single family residen-

tial real property whose property was assessed in Fiscal Year 1973 at a level of assessment (debasement factor) in excess of 55 percent of estimated market value. These computations shall include the names and addresses of each person entitled to a refund, each property for which a refund is due, the amount of taxes which were paid, the amount of taxes which should have been paid, and the basis on which this calculation was made (e.g. estimated market value), and the refund due.

(2) That the Petitioners shall examine the computations prepared by the Respondents and notify both the Court and Respondents by no later than September 17, 1974 as to whether they are in agreement with the computations of the Respondent as to the amounts of refunds due.

(3) That the Respondents shall make such information available to Petitioners

as will enable them to fully and adequately review the computations made by Respondents;

(4) That if the parties are in agreement as to the amount of the refund due to be entered as the decision pursuant to the findings and conclusions made by the Court, the Respondents shall file, within three (3) days after being notified by Petitioners that they are in agreement, with the Deputy Clerk for the Tax Division an original and 2 copies of a computation showing the amount of the refund due, together with a statement to the effect that there is no disagreement and that the figures shown are in accordance with the findings and conclusions of the Court. A decision will then be entered accordingly.

(5) That if, however, the parties are not in agreement as to the amount of the

refund due, they shall notify the Court of the basis of their disagreement by no later than September 20, 1974. Pursuant to the procedure set forth in Superior Court Tax Rule 15 (b) to be followed in the absence of agreement, either party may file with the Deputy Clerk for the Tax Division a computation of the amounts of refunds believed by such party to be in accordance with the findings and conclusions of the Court and shall serve a copy of those computations on the opposing party. The matter will then be scheduled by the Court for argument. If the opposite party fails to file an objection accompanied by an alternative computation at least 5 days prior to the date of such argument or any continuance thereof, the Court may determine to enter decision in accordance with the computation already submitted.

(6) That if computations are submitted

by the parties which differ as to the amount to be entered as the decision, the parties shall be afforded an opportunity to be heard in argument thereon on the date fixed, and the Court shall determine the amount of refund due and enter its decision accordingly. Pursuant to Superior Court Tax Rule 15(c), any argument shall be confined to the consideration of the correct computation of the amount of refunds due resulting from the findings and conclusions theretofore made, and no argument shall be heard upon or consideration given to any new issues or to the issues or matters already disposed of by such findings and conclusions. The hearing shall not be regarded as affording an opportunity for rehearing or reconsideration.

/s/ Joyce Hens Green
Joyce Hens Green
Judge

Copies to Counsel

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7539

DISTRICT OF COLUMBIA, A Municipal Corporation,
and
WALTER E. WASHINGTON,
and
KENNETH BACK, APPELLANTS,

v.

CLARZELL GREEN, ET AL., APPELLEES.

Appeal from the Superior Court of the District of Columbia

(Argued September 7, 1973 Decided October 9, 1973)

Louis P. Robbins, Assistant Corporation Counsel, with whom *C. Francis Murphy*, Corporation Counsel, and *Henry E. Wixon, Robert E. McCally, Richard W. Barton, David P. Sutton, Kenneth A. Pels* and *Richard L. Aguglia*, Assistant Corporation Counsels, were on the brief, for appellants.

Gilbert Hahn, Jr., with whom *Jack C. Sando* was on the brief, for appellees. *Philip W. Amram, Daniel G. Grove* and *Steven L. Engelberg* also entered appearances for appellees.

Before Reilly, Chief Judge, and Kelly and Nebeker, Associate Judges.

KELLY, *Associate Judge:* This appeal is from an order entered in the Superior Court, Tax Division, enjoining appellants from using, for purposes of taxation of single-family residential properties within the District of Columbia, unequal levels of assessment of estimated market value in determining the assessment, valuation or equalization of such properties, and from assessing such properties at a level of assessment other than 55% of estimated market value unless and until an equal level of assessment is established by the District after full compliance with the provisions of the District of Columbia Administrative Procedure Act (DCAPA).[1] The issues outlined by appellants for review are (1) whether the trial court erred in holding temporarily unequal single-family property levels of assessment (debasement factors)[2] of 55% and 60% to be unconstitutionally discriminatory when such temporary inequality resulted from a city-wide cyclical reassessment work program designed to ultimately equalize all single-family property assessments with the multi-family and commercial properties debased at 65%; (2) whether the trial court's holding compels an unconstitutional discrimination against multi-family and commercial properties and 20% of the single-family properties in the District of Columbia; (3) whether the development of a cyclical assessment program designed to bring certain properties into compliance with constitutional and statutory mandates for equalization is "rulemaking" within the meaning of the DCAPA, and (4) whether the failure of some appellees to exhaust

---

[1] D.C. Code 1972 Supp., § 1-1501 *et seq.*

[2] The terms "level of assessment" and "debasement factor" are used interchangeably throughout this opinion.

their administrative remedies and of others to pursue their statutory legal remedies precluded the trial court from granting injunctive relief. Appellees are in substantial agreement with the issues appellants present for review, demurring only to the suggestion that any question of a constitutionally prohibited discrimination against owners of properties in categories other than single-family properties is embraced within or even relevant to this appeal.

I

In brief explanation of the essential background to this appeal, there are three components of the mathematical process used to determine the dollar amount of tax due the District from an individual owner of real property each year; namely, the market value of the property, the debasement factor (level of assessment) to be applied to that value to determine the assessment (assessed value), and the tax rate. Market value (also referred to as estimated market value) is the fair market value of a particular property as determined from time to time by District assessors. The debasement factor is the percentage of market value upon which the tax will be levied. The tax rate is expressed in terms of dollars per hundred and is currently $3.32 per each $100 of an individual property's assessed value.

The assessment for an individual taxpayer is determined by multiplying the market value of the property by the debasement factor or level of assessment.[3] The tax rate applied to the assessed value of the property is set by the City Council after notice published in the District of Columbia Register and, like the level of

[3] Example: A house valued at $100,000 with a debasement factor of 60% is assessed at $60,000 and taxed at the rate of $3.32 per $100 of assessed value—$1,992.00.

assessment, is fixed. The third component of the above equation, market value, is a variable with each individual property having a unique estimated value. Upon receipt of a tax bill, an aggrieved taxpayer may complain of an alleged unfair assessment to the Board of Equalization and Review (Board)[4] and, beyond that, appeal to the Tax Division of the Superior Court.[5]

For several years immediately prior to calendar year 1969, if not before, all single-family residential properties in this city had a debasement factor of 55% and all multi-family residential, commercial and industrial real property was assessed at 65% of estimated market value. Thereafter, in a planned cyclical reassessment program, conceived and orally implemented by the Director of Finance and Revenue, the level of assessment for approximately 33,000 single-family residential properties was changed from 55% to 60% for fiscal year 1973, and, in preparing the tax rolls for fiscal year 1974, an additional 44,485 single-family properties were debased at 60%.[6] The level of assessment of nearly 19,000 single-family residential properties remained at 55%.

Of the 44,485 taxpayers who at the end of 1972 received notices of assessments for fiscal year 1974, only 1,044 appealed, three of whom somehow ascertained the existence of, and raised as an issue, the increased level of assessment of their properties. Of the eleven named petitioners below (appellees), five unsuccessfully complained to the Board of Equalization and Review of alleged unfair assessments; six did not so complain. This

[4] D.C. Code 1972 Supp., § 47-709; § 47-2405.

[5] D.C. Code 1972 Supp., § 11-1202.

[6] Assessment is done on a calendar year basis for the following fiscal year.

class action was brought by petitioners on behalf of themselves and others so situated to enjoin the respondents (appellants) from applying the 60% debasement factor against their properties unless and until the same level of assessment was applied to all single-family residential properties within the District after compliance by the District with the pertinent provisions of the DCAPA. After a lengthy trial the court granted appellees the relief sought, accompanying its order with a comprehensive and learned memorandum opinion with which we are in full accord.[7]

The critical factors upon which we focus in our decision are (1) that the District's cyclical reassessment program was undertaken in a manner which resulted in unequal levels of assessment within a single class of assessed property, and (2) that no notice was given to District of Columbia single-family residential property owners that the level of assessment of their properties was in the process of change.

II

Relying upon D.C. Code 1967, § 47-709, appellants challenge the jurisdiction of the trial court to determine the claims of the six appellees who failed to complain of their increased assessments to the Board, alleging a failure to exhaust their administrative remedies;[8] assert

---

[7] WASH. L. REP., Vol. 101, No. 172, p. 1737; No. 173, p. 1749; No. 174, p. 1761 (1973).

[8] D.C. Code 1972 Supp., § 47-709:

> The valuation of the real property made and equalized as aforesaid shall be completed not later than the first Monday of May annually. The valuation of said real property made and equalized as aforesaid shall be approved by the Commissioners not later than July 1, annually, and when approved by the Commissioners shall constitute the basis of taxation for the next succeeding year and until another valuation is made according to law, except as hereinafter provided. Any person aggrieved by any assessment, equalization or valuation made may within six months after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in sections 47-2403 and 47-2404: *Provided, however,* That such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment as herein provided, except that, in case of increase of valuation of real property over that for the immediately preceding year, where no notice in writing of such increase of valuation is given the taxpayer prior to March 1 of the particular year, no such complaint shall be required for appeal.

that the appellees who did complain to the Board are barred from suit by language in D.C. Code 1972 Supp., §§ 47-2403—2405 specifying that the court may not entertain a taxpayer's petition until after October 1, and after payment of the tax in full, and claim that the trial court erred in issuing an injunction in the face of D.C. Code 1967, § 47-2410 which provides that

> No suit shall be filed to enjoin the assessment or collection by the District of Columbia or any of its officers, agents, or employees of any tax.

These jurisdictional points are not pressed with vigor here, each of the parties preferring a decision on the merits. Consequently, we simply point out that appellants' latter argument would be readily accepted except that the trial court found the facts of this case to be so exceptional and extraordinary as to merit equitable relief and, as the Court said in *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932):

> [W]here complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. . . . [Citations omitted.] [9]

Additionally, the trial court found that since the six named petitioners (appellees) who bypassed the Board could not have known of the changed level of assessment until it was reluctantly made public in this lawsuit in June of 1973, they were unable to pursue the administrative remedy created by statute prior to cutoff date of April 1, 1973.[10] It also found, in effect, that under the extraordinary circumstances of this case, outlined at length in its memorandum opinion and not repeated here, the petitioners who did not appeal to the Board were in reality afforded no effective administrative remedy. Moreover, the court saw no reason to require the parties who in good faith sought administrative review to wait until October 1 to apply for relief, after payment of tax, when those bypassing the useless administrative procedure were permitted to proceed, stating that to accept such an argument "would, in effect, add yet another dimension of inequity to a situation already surrounded by unfairness, secrecy and lack of candor." [11] The evidence of record supports the findings of the

[9] *See also Allen v. Regents of University System of Georgia*, 304 U.S. 439 (1938).

[10] In its words: "The court is not persuaded by this argument and cannot believe that Congress intended that the statute be subverted to include deceit of the populace, by either unintentional oral and written misinformation (at best) or by deliberate misstatement (or deliberate omission) of oral and written information (at worst)." R. at 666.

[11] R. at 667.

trial court and, as a consequence, it was not error to entertain the petition for injunction. As the Circuit Court said in *Tumulty v. District of Columbia*, 69 App. D.C. 390, 399-400, 102 F.2d 254, 263-64 (1939):

> We think it clear that all administrative remedies in matters of taxation must be exhausted before resort can be had to court action. Nelson v. First Nat. Bank, 8 Cir., 42 F.2d 30, but think *it equally clear that when the assessment is void, the taxpayer may resort to equity for relief, without following statutory remedies.* . . . [Emphasis supplied.]

III

Appellees successfully contended in the trial court that the fixing of a level of assessment for real property is rulemaking within the meaning of the District of Columbia Administrative Procedure Act.[12] They conceded there, and concede here, that prior to the effective date of the DCAPA appellants had a right to make a rule setting the level of assessment at 55% of market value for residential property in the District and 65% of market value for commercial property without notice to or opportunity by the public to be heard. Conceded also is appellants' right at any time to change the level of assessment of residential property to a higher percentage of market value if it is done in compliance with the pertinent provisions of the DCAPA.

Appellants argue that the Constitution and the per-

[12] D.C. Code 1972 Supp., § 1-1507(c). The DCAPA, effective October 21, 1969, required that all administrative rules then in effect be published in the District of Columbia Register by October 21, 1970. It is undisputed that no rules governing the method of assessment of real property have been published.

tinent statutory provision [13] governing assessment of real property compel the same level of assessment be applied to *all* real property in the District of Columbia; consequently, any change in the level of assessment for single-family residential property in the process of accomplishing equalization in assessment does not constitute a rule within the meaning of the DCAPA.

D.C. Code 1972 Supp., § 1-1502(6) and (7) defines the terms "rule" and "rulemaking" as:

> (6) the term "rule" means the whole or any part of any Commissioner's, Council's, or agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of the Commissioner, Council, or of any agency;
>
> (7) the term "rulemaking" means Commissioner's, Council's, or agency process for the formulation, amendment, or repeal of a rule;

The trial court found, correctly we think, that the interpretation or implementation of the words "full and true value" contained in § 47-713 of the Code was a rule within the meaning of § 1-1502(6) and its formulation was rulemaking within the definition of § 1-1502(7).

The meaning of "full and true value" of single-family residential properties had for a number of years been 55% of estimated market value. This 55% debasement factor, albeit unpublished, was, under the Code defini-

---

[13] D.C. Code 1967, § 47-713, provides in pertinent part:

> All real estate in the District of Columbia subject to taxation, including improvements thereon, shall be listed and assessed at not less than the full and true value thereof in lawful money.

tion, a rule. Both the tax rate and the debasement factor are fixed values in the assessment equation. The setting of the tax rate by the City Council is admittedly a rule which must be published, with an opportunity for a public hearing provided for by the DCAPA. Setting or changing the debasement factor affects the final tax bill in exactly the same manner as does the setting of the rate, and to allow the debasement factor to be secretly established or changed would completely frustrate the purpose of being able to review the tax rate later when it is set each year.

Appellants argue that since they are constitutionally required to achieve equalization of the level of assessment of all real property, commercial and residential, a change of the debasement factor is not rulemaking within the meaning of the DCAPA. Should this constitutional requirement exist, however, it does not compel the conclusion that the District may not be required to accomplish its goal by constitutional means or that the necessary changes of levels of assessment in the process are not rules and rulemaking as defined in the DCAPA.

This court has held that a Commissioner's Order directing the Department of Human Resources to set the level of public assistance payments at 75% of the public assistance standards to be a rule, stating that "Commissioner's Order No. 70-265, whether we consider it an *implementing* directive, as Corporation Counsel characterizes it, or *prescribing* policy, is a 'rule' as defined by the D.C. APA. . . ." [Footnote omitted.] *Junghans v. Department of Human Resources*, D.C.App., 289 A.2d 17, 23 (1972). A like holding is required here.

IV

Appellants contend that the tax policy of the District has always been to uniformly apply a 65% debasement

factor to *all* real property in the District of Columbia, both residential and commercial. This "policy", however, has never been articulated to the general public and was apparently unknown to some assessors. The facts are that until 1969 the District compiled and used a real estate assessment manual designed to achieve a debasement of 65% of value, there being no identifiable market value at that time to debase. Sales ratio studies undertaken in 1968 revealed, however, that some single-family residential properties were actually debased as low as 40%, although the desired 65% factor for multi-family and commercial properties was substantially achieved. As a result, the District developed a reassessment program to equalize single-family residential properties with other real property at a 65% level of assessment. In an effort to accomplish a common debasement factor while maintaining relative equalization within the single-family residential class a "stair-step" approach was decided upon as the means to attain the desired result over a period of time, an approach necessitated both by budgetary and manpower considerations. The debasement factor of all single-family residential properties was first raised to 55%, the next planned step being to raise the level of assessment to 60% and the final goal being to elevate the debasement factor of all such properties to 65%. Thus, the level of assessment on over 33,000 single-family residential properties was raised to 60% in fiscal 1973, and an additional 44,485, those at issue in this case, had been entered on the tax rolls for fiscal 1974 at 60%. Approximately 19,000 properties remain debased at 55%.

The District of Columbia has no rule dividing real property into various classes for the purpose of taxation. The only requirement of these *ad valorem* taxes is that they be administered in a fashion that results in equali-

zation of the tax burden on all property owners.[14] The amount of a property owner's tax bill must be related as nearly as possible to the value of his property as compared to the value of the property of others. The ratio of his property's value to the total value of property in the District should parallel the amount of tax he pays compared to total taxes paid by all property owners.

Equalization depends directly on a fair and critical assessment of each piece of real property in the District. As expert witnesses for the District testified, assessment is an art which requires an experienced eye. It is therefore important, if taxes are to be equalized, that individual assessments be done thoroughly. Appellants have stressed that they have been unable, due to fiscal and manpower shortages, to effectuate an adequate assessment of all property in the District each year, and this is understandable. Under such circumstances a cyclical assessment program may be permissible, provided any inequalities resulting therefrom are of an accidental and temporary character. *See, e.g., Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350 (1918); *Johnson v. County of Ramsey*, 290 Minn. 307, 187 N.W.2d 675 (1971); *Carkonen v. Williams*, 76 Wash.2d 617, 458 P.2d 280 (1969) (en banc); *Skinner v. New Mexico State Tax Commission*, 66 N.M. 221, 345 P.2d 750 (1959). Indeed, appellees agree that if the District had engaged in a cyclical program of adjusting the fair market value of properties in the city one group at a time, this case would not have arisen. But the District did not follow this course. Instead, as the record shows, it chose to apply different debasement factors to the same class of property in the

---

[14] *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1959); *Hillsborough T P v. Cromwell*, 326 U.S. 620 (1946); *Colgate v. Harvey*, 296 U.S. 404, 423 (1935); *Wells Fargo & Co. v. Johnson*, 214 F. 180 (8th Cir. 1914), *aff'd*, 239 U.S. 234 (1915).

same year and, in so doing, denied the appellees equal protection of the laws by discriminating among residential taxpayers.[15]

In the case of *Weissinger v. Boswell*, 330 F. Supp. 615, 621-22 (M.D. Ala. 1971), the court declared unconstitutional under Alabama's *ad valorem* property tax system the application of two different levels of assessment to the same class of property, stating that ". . . while the Fourteenth Amendment does not require precise equality or uniformity in taxation, or prohibit inequality in taxation which results from mere mistake or error in judgment of tax officials, it does 'secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' . . ." [Footnotes omitted.]

The justification the District offers for the admitted intentional disparity of debasement factor applied to taxpayers within the same class is that the "stair-step" approach was the only way to bring all properties to the uniform level of assessment of 65% without seriously frustrating the only long-range goal of the tax system—equalization. The trial court did not accept the logic of this conclusion, nor can we.

The only variable in the tax equation for real property is the estimated fair market value. As the District admits, when the real estate market and other factors cause the fair market value to fluctuate, nearly constant reassessment is necessary, though not always feasible. If actual fair market value is determined by the amount realized in an arm's length sale of property, a comparison between the latest assessed value and this sales value constitutes the assessment/sales ratio. The disparity between the two values is expressed by a dispersion coefficient. The higher the coefficient, the greater the difference between the last assessed fair market value and the fair market value indicated by sale. Various factors may account for such a difference, but in any event the Board of Assessors is interested in minimizing the coefficient of dispersion.

[15] *Bolling v. Sharpe*, 347 U.S. 497 (1954), reads the Fourteenth Amendment equal protection clause into the due process clause of the Fifth Amendment to apply it to the District of Columbia.

The assessment/sales ratio may well vary in different parts of the District, and even within the same block. This disparity inevitably produces the undesirable result of placing unequal tax burdens on persons owning property with the same fair market value. For example, if two different taxpayers own property identical in fair market value but one property is currently assessed at a higher value than the other due to the inability of the assessors to value all property every year, taxpayers owning property of identical values pay different tax bills. As another example, if the property of each of these taxpayers is currently assessed at the same market value but as part of a "stair-step" approach to reach a uniform 65% debasement value one level of assessment rises to 60% while the other remains at 55%, the taxpayers owning property worth the same amount in the taxable year have different tax bills.

In neither of the above examples has the goal of equalization been reached. Yet the two situations are distinguishable in important ways. In the first situation the lack of equalization between taxpayers is undesirable but permissible because caused by logistical problems which may be temporarily beyond the power of the city to correct. In the second case the lack of equalization is caused by an intentional and arbitrary application of two

different debasement factors to identical properties.[16] The aggrieved taxpayer in the first example may complain to the Board of Equalization and Review if he feels that his assessment is too high and, since the assessment of fair market value is admittedly a rather subjective art, by requesting reconsideration of his valuation, he may be successful in lowering his assessment. The facts of the instant case show that in the second example the aggrieved taxpayer has no meaningful ability to challenge his assessment at all. No judgment would be made in his case as the new debasement factor was arbitrarily determined as was its applicability to certain real property.

Estimated market value, being the only variable in the equation determining the amount of tax owed, would appear to be the factor to be periodically adjusted to reflect changes in property values which the District recognizes occur for many different reasons that are difficult to forecast. If the District desires, or feels compelled, to apply an equal debasement factor across the board to all real property within the District, however, the proper course would be to formulate such a rule and publish it in accordance with the procedure prescribed by the DCAPA. An immediate raise to 65% might well be politically unpleasant, as the District clearly recognized but, if the need to raise the level of assessment to 65% is as compelled as the District contends, this result is unavoidable. Moreover, it is just as unavoidable using the "stair-step" approach although perhaps not as visible. In fact, evidence before the trial court demonstrated the assessments in years where the "stair

[16] The District argues that one of its exhibits in evidence demonstrates that in reality the differential in levels of assessment resulted in greater equalization than before, but appellees disagree and the trial court did not so find, nor was it required to do so.

steps" were being used caused assessment increases that went above and beyond the increases that would have been caused by property appreciation alone. This should be no surprise, for any raise in the debasement factor must raise the assessment. The fair market value cannot be held below its true level while the debasement factor is inched towards 65% simply to keep taxes the same, at least if the concept of fair market value is to have any clear and understandable meaning. And as already mentioned, the facts of this case have highlighted the importance to the taxpayer of an accurately stated fair market value; it is the only element in the tax formula to which he can meaningfully object. If real increases in his property assessment are disguised in the form of a higher debasement factor, he is totally remediless within the normal avenues for seeking redress.

Finally, appellants complaint that the trial court's order "convert[s] a relatively equalized tax roll into a patently discriminating tax roll."[17] The trial court determined that the assessments at issue were void because of a differential in levels of assessment within one class of real property, and the District cannot now be heard to say in this appeal that in attempting to cure one allegedly discriminatory method of assessment between single-family residential property and other classes of real property it can in the process deliberately discriminate between members within the one class of single-family residential property owners. Therefore, irrespective of whether the District may constitutionally differentiate in the level of assessment applied to residential real property as opposed to commercial real property, a question which we need not and do not here decide, it clearly may not do so within the single class of residential property owners.

Affirmed.

[17] Appellants' brief at 12.

DISTRICT OF COLUMBIA COURT OF APPEALS

NO. 7986

District of Columbia, Appellant,

v.

Burlington Apartment House Company
T/A The Burlington Hotel, Appellee

Appeal from the Superior Court of the
District of Columbia

(Argued January 22, 1975 Decided January 29, 1976)

Melvin J. Washington, Assistant Corporation Counsel, with whom C. Francis Murphy, Corporation Counsel, and Henry E. Wixon, Assistant Corporation Counsel, were on the brief, for appellant.

Christopher Sanger for appellee.

Before KELLY, GALLAGHER and HARRIS, Associate Judges.

Opinion for the court by Associate Judge KELLY.

Opinion by Associate Judge HARRIS concurring in part and dissenting in part at p. 16.

KELLY, Associate Judge: The District of Columbia here appeals from an order of the trial court's Tax Divison reducing from

$84.61 to $67.00 per square foot the real property tax assessment on Lot 97, Square 214, for the fiscal years 1973 and 1974. The land in question is improved by a structure known as **The Burlington** Hotel, which is owned and operated by appellee. The hotel was built between the years 1905 and 1910, is seven stories high, and fronts on Vermont Avenue, N. W., just south of Thomas Circle.[1] The parcel of land contains 42,408 square feet.

The District initially assessed Lot 97 at $92.30 per square foot for fiscal year 1973,[2] but on appeal to the District

1 The District states in its brief that the value of the improvements on the land is insignificant and we do not include it here, except insofar as it is contained in the findings of the trial court.

2 This represents a market value of $3,914,584.60 and a value on the tax rolls of $2,544,480.00, the latter being an assessment at 65% of market value.

of Columbia Board of Equalization and Review, the assessment was adjusted to $84.61 per square foot.[3] After the real property tax derived from this assessment was paid, appellee filed a petition with the Tax Division of the Superior Court seeking to further reduce the assessment rate; first to $60.00 and later, by amendment during trial, to $64.00 per square foot. The court ultimately valued[4] the property at $67.00 per square foot for both fiscal year 1973 and fiscal year 1974 and ordered that the District refund to

3 This represents a market value of $3,588,369.20 and a value on the tax rolls of $2,332,440.00.

4 Market value is that price which a willing seller would be willing to accept and a willing buyer would be willing to pay for the property, assuming that both are knowledgeable of all the present or potential elements of value involved and that neither is under duress or obligation to act. Reservation Eleven Associates v. District of Columbia, 136 U.S.App.D.C. 311, 313, 420 F.2d 153, 155 (1969).

appellee a tax overpayment of $15,308.72, with interest, within ten days of its order. We affirm the trial court's decision relating to fiscal year 1973 and reverse as to fiscal year 1974.

I

Preliminarily, citing George Hyman Construction Co. v. District of Columbia, D.C.App., 315 A.2d 175, 177 (1974) and District of Columbia v. Berenter, 151 U.S.App.D.C. 196, 203 466 F.2d 367, 374 (1972), the District contends that the Tax Division was without jurisdiction to enter an order with regard to fiscal year 1974 taxes since appellee had failed to utilize the requisite statutory procedures to contest that year's assessment. It stresses the fact that appellee's petition in the Tax Division did not include a refund request for fiscal year 1974 and that it was never amended to do so.

Two arguments are advanced by appellee in support of the trial court's property assessment for fiscal year 1974: first, that the District had not "reassessed" or "revaluated" the property for that year, but had merely adopted the Board's equalized figure for fiscal year 1973; and second, that once the value of the property was finally equalized by the Tax Division, this valuation was effective until a new valuation of the property was made according to law.

The statutory scheme for relief from allegedly inaccurate fiscal year assessments is found in D.C. Code 1973, §§ 47-709, 47-2403 and 47-2404,[5] and the administrative

5 The timetable for establishment, notice and appeal of real estate assessments was substantially revised by the District of Columbia Real Property Tax Revision Act of 1974, P.L. 93-407, §§401-29, 88 Stat. 1036 (effective July 1, 1975) and regulations promulgated thereunder. Regulation 74-35, 21 D.C. Register 1309-27 (effective Dec. 12, 1974).

remedies outlined there must be exhausted before a taxpayer may pursue court action.[6] Sections 47-709 and 47-2403 provide that where the assessment for the following fiscal year is received before March 1st, or after March 1st but without an increase in valuation, a complaint must be made to the Board of Equalization and Review which sits from January 1 through April 1 for that particular purpose (D.C. Code 1973, § 47-708) If such complaint is made and adversely decided the taxpayer may, after all taxes for the entire fiscal year are paid, appeal to the Superior Court after October 1 and for the six months following. Where, however, there is an increase in valuation and notice

6 An exception existed where the assessment was void. District of Columbia v. Green, D.C.App., 310 A.2d 848, 852-53 (1973).

in writing is received after March 1st, a complaint to the Board is unnecessary. An appeal can then be taken to the Superior Court, after all taxes for the fiscal year have been paid, beginning October 1 and for six months following.

In the instant case, notice of the fiscal year 1974 assessment of $2,332,440.00 was received by appellee sometime after March 27, 1973, and was identical in amount to the Board's equalized assessment for fiscal year 1973. Thus, with regard to its 1974 tax, appellee would have had to complain of the assessment to the Board and, if unsuccessful, pay the tax and appeal to Superior Court for the latter to have jurisdiction over its fiscal year 1974 taxes. As appellee did none of these things, the court had no authority to affects its taxes

for that fiscal year.[7]

II

The District also contends that it could not be required, as the trial court directed, to refund to appellee its fiscal year 1973 real property tax overpayment within ten days of the court's order. It asserts that the time and manner of refunding taxes erroneously paid are controlled by the provisions of D.C. Code 1973,

---

7 We note in passing that different tax years have long been regarded in the law as separate entities, Commissioner v. Sunnen, 333 U.S. 591, 598 (1948); Keokuk & W.R. Co. v. Missouri, 152 U.S. 301, 314-16 (1894), as have assessments also, City of East Orange v. Township of Livingston, 103 N.J.Super. 109, 246 A.2d 722 (1968); People v. Haring, 286 App.Div. 676, 146 N.Y.S.2d 151 (1955). In District of Columbia v. Green, supra at 852, we stated that in "exceptional and extraordinary" circumstances (deliberate discrimination between members of one class of property owners), equitable relief could be sought to enjoin the assessment of a tax. However, the facts of this case are such that resort to equitable relief is inappropriate. Appellee had an adequate remedy at law to contest his 1974 assessment but failed to invoke the jurisdiction of the Superior Court. We thus disagree with the dissent's assertion that our ruling curtails the Superior Court's equity jurisdiction in tax cases.

§§ 47-1016 and 47-2407, the latter section providing for the refund of sums "finally determined" to have been erroneously paid. Finality is spelled out in some detail in § 47-2404 which states, in general, that a Superior Court order in a civil tax matter which is appealed to this court becomes final only when the time for any other review or appeal has expired or when 30 days have elapsed after certain dispositions, such as an affirmance by the Supreme Court or the rendering of an opinion by the Superior Court in accordance with the mandate of either the Supreme Court or this court. Accordingly, since the order here in question will not be final until the appeal process is completed, the trial court's direction that the District refund the contested overpayment within ten days was an invalid attempt to confer finality on

its order in a manner which conflicts with the statute and, in addition, which infringes upon the right of the parties to appeal.[8]

III

Numerous claims of error regarding the court's ultimate fiscal year 1973 assessment are advanced by the District, the one most pressing here being the exclusion at trial of a prior offer by appellee to sell the property. From the deposition of appellee's president it appears that in the Spring of 1972 he had authorized a real estate agent to sell the property for $70.00 per square foot and that during subsequent negotiations he asked $75.00 per square foot for the property with the furniture and

---

8 D.C.App.R4 II(a)(1); D.C. Code 1973, § 11-721 (a)-(c).

fixtures included.[9] However, these negotiations never resulted in the grant of an option to purchase the property. The District nevertheless claims that the asking prices set by the owner for purposes of sale should have been allowed in evidence as admissions against interest and as probative of fair market value.

There is some authority which holds that in actions to which the owner of property is a party, his offers to sell the property may be introduced as admissions by the opposing party, provided they are not too remote in time,[10] and one juris-

9 Other efforts to sell the property in 1973 sought to be introduced are not relevant to the issue of market value for fiscal year 1973 which had to be determined as of July 1, 1972.

10 United States v. Certain Land in Baltimore County, Maryland, 209 F.Supp. 50, 56 (D.Md. 1962); Durika v. School District of Derry Township, 415 Pa. 480, 203 A.2d 474 (1964) (Cohen, J., dissenting); cf. Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 589 (1923).

diction has held that offers by a landowner to sell his property are among the factors to be considered in assessing the property for purposes of taxation.[11] We do not understand that Cloud v. Veeder, 41 Ala.App. 558, 140 So.2d 292 (1962), cited by appellee, holds to the contrary. In Cloud, a property owner, suing for damages for fraud in its sale to him, testified to the price at which he was subsequently offering the house for sale. Similarly, in United States v. Smith, 355 F. 2d 807, 810-11 (5th Cir. 1966), evidence of options was introduced on behalf of a landowner-condemnee (which, in addition,

11 Alstores Realty, Inc. v. State, 286 Minn. 343, 176 N.W.2d 112 (1970); Schleiff v. County of Freeborn, 231 Minn. 389, 43 N.W.2d 265 (1950); State v. Russell-Miller Milling Co., 182 Minn. 543, 235 N.W. 22 (1931) (cited by that court as In re Delinquent Real Estate Taxes, Waseca County).

concerned other properties). In both cases the testimony was held to be self-serving and therefore inadmissible.

Appellee asserts, however, and we agree, that even if the court's evidentiary ruling was error, the error was harmless in view of other testimony given at trial. For example, the District presented the court with data on nine sales in the surrounding area through an expert witness and his prepared appraisal report.[12] These sales ranged in value from $67.00 to $147.00 per square foot, and the witness testified that in his opinion the market value of the property was $84.00

12 This testimony is discussed in greater detail infra.

per square foot. Thus, there was credible testimony on which the court could have based a finding that the value of the property exceeded the owner's asking price of $75.00 per square foot had it been so persuaded.[13]

IV

The District's next contention with regard to the fiscal year 1973 assessment is that the court's valuation of the property is against the weight of the evidence. In particular, the District argues that appellee's appraisal report was not probative because its expert witness (1) did not inquire into the circumstances of the sales

13 We are in agreement with the trial court's observation that an unacted upon offer to sell is not highly probative of value in the context of an assessment proceeding.

on which his opinion was based and (2) used in his report sales which were not comparable because they were of properties which were smaller and less accessible than the subject property. It also attacks the testimony of appellee's other expert witness on the ground that he did not inquire into the circumstances of the sales upon which his opinion was based. Lastly, the District complains that the court's valuation of the property was less than that given the property by appellee and its experts.[14]

Notwithstanding the District's insistence that to have this assessment reduced

14 Several other claims of error by the District of this tenor have been considered and found to be without merit.

appellee must show that the government's assessment of the property resulted from fraud, illegality or, at the very least, that it was arbitrary and inequitable,[15] our standard of review of purportedly erroneous property assessments is whether the property has been assessed in accordance with the statute, i.e., at "the full and true value thereof in lawful money". D.C. Code 1973, § 47-713. And the findings of the Tax Division must be accepted unless they are clearly erroneous. District of Columbia v. Neyman, 135 U.S.App.D.C. 193,196, 417 F.2d 1140, 1143 (1969); Super.Ct.Civ. R.52(a).[16]

15 The District relies upon District of Columbia v. Capital Laundry and Dry Cleaners, Inc., D.C.Mun.App. 106 A.2d 695 (1954) (Hood, J., concurring). That case does not apply to proceedings in the Tax Division, however. Pepsi-Cola Bottling Co. v. District of Columbia, 119 U.S.App.D.C. 73, 76 n.3, 337 F.2d 109, 112 n.3 (1964).

16 "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Company, 333 U.S. 364, 395 (1948); cf. 4 K. Davis, Administrative Law §29.02 at 121-22 (1958).

In general, real property is valued for tax purposes according to its highest and best use rather than according to its actual use at the time of valuation.[17] And once the highest and best use has been established, or is assumed, the tax appraiser may use any one or all of several different methods for estimating value.[18] Many factors are relevant to the appraisal of real property, including location, size, use, neighborhood, and special

17 Wagner v. Commissioner of Taxation, 258 Minn. 330, 104 N.W.2d 26 (1960); National Folding Box Co. v. City of New Haven, 146 Conn. 578, 153 A.2d 420 (1959). Condemnation cases such as State v. Hedwig, Inc., 133 So.2d 180, 182 (La.App. 1961), overruled on other grounds, State, Dept. of Highways v. Terrace Land Co., 298 S.2d 859, 862 (La. 1974), are also relevant here as market value is determined in the same way in both condemnation and assessment proceedings. Sorokach v. Trusewich, 35 N.J.Super. 86, 113 A.2d 194 (1955).

18 Weil v. Supervisors of Assessments of Washington Co., 266 Md. 238, 292 A.2d 68 (1972); Fitzsimmons v. McCorkle, 59 Del. 94, 214 A.2d 334 (1965).

utility of property.[19] Reference to sales of similar properties is sometimes referred to as a method of valuation[20] and sometimes such sales are considered as one of the factors contributing to the determination.[21] Additionally, whether or not the sales used by a party to establish value are comparable to the subject property is a factual issue which the trial judge has discretion to determine.[22] Where sales are not comparable they are irrelevant to the

19 J.H. Becker, Inc. v. Township of Marlboro, 82 N.J.Super. 519, 198 A.2d 463 (1964); Traylor v. City of Allentown, 378 Pa. 489, 106 A.2d 577 (1954); Schleiff v. County of Freeborn, supra note 11, 43 N.W.2d at 268.

20 E.g., Lerner Shops of Connecticut, Inc. v. Town of Waterbury, 151 Conn. 79, 193 A.2d 472 (1963).

21 See cases cited supra note 19.

22 Leeaye, Inc. v. District of Columbia Redevelopment Land Agency, 111 U.S.App.D.C. 316, 296 F.2d 438 (1961).

proceeding and hence inadmissible,[23] but sales may be comparable where properties are used or could be used for the same purpose but do not occupy adjacent tracts.[24]

Appellee called three witnesses at trial. Mr. Hudson Moses, its president, testified that in his opinion the value of the corporate property was influenced by its proximity to the 14th Street neighborhood, the location of bars, peep shows, pornographic bookstores, strip joints, and

23 District of Columbia Redevelopment Land Agency v. 61 Parcels of Land, 98 U.S.App.D.C. 367, 368, 235 F.2d 864, 865 (1956). See also State, By and Through Its Road Commission v. Larkin, 27 Utah 2d 295, 495 P.2d 817 (1972).

24 United States v. American Pumice Company, 404 F.2d 336 (9th Cir. 1968) [condemnation, pumice claim]; Weil v. Supervisors of Assessments of Washington Co., supra note 18 [assessment, gasoline service station] ; Traylor v. City of Allentown, supra note 19 [assessment, hotel and apartment property] ; cf. District of Columbia v. Lot 813 in Square 568, 232 F.Supp. 714, 718 (D.D.C. 1964), aff'd sub nom. Rubenstein v. District of Columbia, 120 U.S.App.D.C. 352, 346 F.2d 833 (1965) (Fahy, J., dissenting).

prostitution. Mr. William Calomiris, a real estate broker who had previously been engaged to lease or sell the property, testified that an office building with a lease to the government would be the highest and best use of the property. He said that he would not consider any other use as feasible, and particularly not a motel, since a relatively new hotel in the area was doing very poorly. In his opinion, based on comparable sales in the area, the property was worth $64.00 per square foot.

Mr. Calomiris regarded the property as part of a neighborhood stretching from Vermont Avenue, east to 13th Street, and south from Thomas Circle to about K Street, N. W. The ten sales on which he based his determination of market value were, for the most part, located within these boundaries and ranged from $36.00 to $69.00 per square foot. Sales of properties cited by Mr. Calomiris

as being on the same block as the subject property were two on Thomas Circle, which sold for $60.70 and $46.00 per square foot in 1972, and 1104-06 Vermont Avenue, N.W., just south of the Burlington Hotel, which sold for $64.00 per square foot in 1967. Mr. Calomiris thought that 15th and M Streets, N. W., was an entirely different area from 14th Street and Thomas Circle, and that while 15th Street marked the point at which the downtown commercial district began to improve, 14th Street had been unable to attract desirable tenants.

Appellee's third witness was Mr. Anthony Reynolds, a professional real estate appraiser, who testified that the highest and best use of the property was a new single structure office building with a single tenant such as the (U.S.) Government Services Administration. He

described GSA's requirements at that time as being a minimum of 300,000 square feet of floor area. Mr. Reynolds testified that there had been no successful privately occupied new building east of 15th Street since 1965 (and perhaps since World War II), and that that area was regarded as a different market from the area west of 15th Street. Mr. Reynolds considered four sales in the same block as the subject property to be comparable. These parcels all fronted on Thomas Circle, with one being adjacent to Lot 97, and were sold for $69.20, $67.95, $60.70, and $46.59 per square foot during June, July and August of 1972. He viewed these parcels as being assembled for a building site.

Mr. Reynolds also considered sites in other portions of downtown Washington that were comparable in size to appellee's property and had been developed for GSA use.

In his opinion these sites were comparable because they had the same highest use and because the rent for the new office space leased by the government was virtually the same, irrespective of location. The four sites included one bought for new construction to be leased by the government in May 1972, one purchased by the District of Columbia Redevelopment Land Agency in 1971, one that had been acquired by the Chesapeake and Potomac Telephone Company in 1970, and one acquired by GSA for renovation in 1971. Prices paid for the sites, adjusted to account for the difference in building area permitted by zoning, were $57.40, $56.90, $70.60, and $60.70 per square foot.

Mr. Robert K. Briden, a real estate appraiser for the District of Columbia Department of Finance and Revenue, was the District's expert witness. His opinion

was that the highest and best use of the property was its subdivision and development as two new office buildings and a motel, each occupying a lot of about 15,000 square feet. His feeling was that such use would be in keeping with new development nearby on 15th Street, particularly since the area of Vermont Avenue above K Street was being revitalized. In setting his valuation of the property, Mr. Briden considered nine comparable sales. Of these, he relied primarily on three: a sale in 1965 of property in the same block, but fronting on L Street, for $91.38 per square foot; a sale in 1966 of a triangular site directly across from the Burlington for $74.72 per square foot; and a sale in 1967 of property at the southwest corner of 15th and M Streets for $104.72 per square foot. He testified that his method of valuing the subject property was to take each of the actual sales, add a percentage

increase for appreciation to July 1, 1972, then make a percentage adjustment for differences in location, corner location, size, zoning, floor area ratio, commercial usefulness, and alley influence.[25]

Mr. Briden stated that he did not rely on the sales of properties to the north of the Burlington, fronting on Thomas Circle, because they were so much smaller and because one, in his opinion, was not a true land sale. He thought that development on Vermont Avenue was being influenced by the new construction on 15th Street and believed that Vermont Avenue was not a good location for GSA because none of the buildings along 15th Street were currently occupied by GSA.

25 In terms of location, a site on Vermont Avenue was worth 25 per cent less than a mid-block site on L Street, N. W., and 35 per cent less than a mid-block site on 15th Street, N. W., in the witness' calculations.

Based on the foregoing testimony and the appraisal reports submitted by both parties the trial judge concluded that the highest and best use of the subject property was the development of a single office building for rental to one large organization such as the GSA or the telephone company. He found two sets of sales relevant to the question of fair market value: the four 1972 sales in the same block of properties on Thomas Circle and the four sales of land as a site for the GSA or a similar tenant which were contained in appellee's appraisal report. The trial judge further found that the market value of the property on July 1, 1972 was $67.00 per square foot. In our judgment, all of these findings are supported by the evidence and are not clearly erroneous.

As to the District's specific objections to the findings of the court, the

sales used by appellee to support its estimated valuation were competent evidence so long as they did not result from foreclosure or legal compulsion. District of Columbia Redevelopment Land Agency v. 61 Parcels of Land, 98 U.S.App.D.C. 367, 368, 235 F.2d 864, 865 (1956); Baetjer v. United States, 143 F.2d 391, 397 (1st Cir.), cert. denied, 323 U.S. 772 (1944). The motivations and circumstances of the sales go to the weight of the evidence offered and not to its admissibility. District of Columbia Redevelopment Land Agency v. 61 Parcels of Land, supra at 369, 235 F.2d at 866.

Whether or not the sales used to compute valution were comparable to the subject property was, as stated earlier, a matter for the trial judge to determine. Here, there was a broad range of testimony concerning sales of different land parcels to aid the trial judge in resolving

the issue of market value. In reaching this resolution it was reasonable for the trial judge to consider four parcels on the same block as the subject property, all sold within a month or two of the appraisal date, as probative. He was aware that the parcels were smaller than Lot 97, but he was also aware that they were most probably being assembled to make a larger building site and that contrary to the subject property they enjoyed a prominent location on Thomas Circle. We conclude, therefore, that the court's finding of comparability of sales has sound support in the evidence.

The District's claim that the value which the court assigned to the property was less than the value testified to by appellee's own experts is likewise without significance. The property was valued

at $64.00 per square foot by one and $67.20 by the other, and the court arrived at an ultimate valuation of $67.00 per square foot. In any event, the opinions of the expert witnesses are simply evidence to aid the trier of fact in reaching a decision and are not conclusive. Cohn v. City and Town of Hartford, 130 Conn. 699, 37 A.2d 237 (1944).

V

Both parties agree that the trial court made a slight arithmetical error in its determination of Lot 97's total debased assessed value due to the inadvertent inclusion of a small adjacent parcel owned by appellee. The property's final debased assessment value for fiscal year 1973 should be $1,846,868.40 and not $1,871,334.79. Accordingly, the order appealed from is reversed as to fiscal year 1974, reduced as to the total debased

assessment for fiscal year 1973,[26] and in all other respects is affirmed.

So Ordered.

---

26 See D.C. Code 1973, §47-2404(a).

HARRIS, Associate Judge, concurring in part and dissenting in part: While I concur in Parts II, III, IV, and V of the majority opinion, I am unable to agree with the conclusion expressed in Part I. In my judgment, the result reached on that issue is contrary to the language and intend of the statutory scheme, and wrongly circumscribes the normal discretionary authority of the trial court in disregard of both the Rules of Civil Procedure and traditional equitable and constitutional principles. I therefore respectfully dissent from that aspect of the majority opinion which inflicts upon appellee a valuation for 1974 (and subsequent years) which we unanimously recognize to be excessive.

I

In February 1972, the District issued a notice of assessment for fiscal year 1973

for the Burlington Hotel property. Appellee appealed the Assessor's evaluation to the District of Columbia Board of Equalization and Review. D.C. Code 1973, §§47-708 and 47-709. Following a hearing the Board issued an order establishing a somewhat reduced fair market value for taxation purposes. Appellee then paid the tax and filed a timely petition contesting the Board's order in the Superior Court. Id., § 47-2403.

The trial court agreed with appellee's contention that the 1973 valuation was arbitrarily high. It arrived at a reduced valuation as legal and correct. We properly affirm that decision. In compliance with the Code and in justice to the taxpayer, the trial court not only ordered the assessment for 1973 lowered, but also decreed "that the aforesaid reduced assessment. . .shall constitute the full

and lawful assessment. . .pursuant to District of Columbia Code § 47-709, for all succeeding years until another valuation is made according to law".

On some date after March 27, 1973 (otherwise unspecified in the record), the District notified appellee of the assessment on the Burlington Hotel property for fiscal year 1974. The figure thus conveyed was not based upon a reassessment or new valuation. Rather, the District merely used the fiscal 1973 figure, which then was being disputed in the Superior Court.

The District argues, and the majority agrees, that the District now may employ an admittedly incorrect valuation in the fiscal 1974 assessment, and that we may not sustain the continued use of the lower valuation which both the trial court and we have held to be proper. Thus, the

majority tells appellee, you have won the battle but lost the war. The majority arrives at this anomaly by the following rather facile syllogism, which apparently leads it to conclude that the trial court was powerless to extend the diminished taxation based beyond fiscal 1973:

> In the instant case, notice of the fiscal year 1974 assessment . . .was received by appellee sometime after March 27, 1973, and was identical in amount to the Board's equalized assessment for fiscal year 1973. Thus, with regard to its 1974 tax, appellee would have had to complain of the assessment to the Board and, if unsuccessful, pay the tax and appeal to Superior Court for the latter to have jurisdiction over its fiscal year 1974 taxes.[1] As appellee did none of these things, the court had no authority to affect its taxes for that fiscal year.[2]

---

1 See D.C. Code 1973, §§ 47-709 and 47-2403.

2 In support of this conclusion, the majority cites "in passing" the proposition that "different tax years have long been regarded in the law as separate entities". However true that may be as a general tax accounting principle, it is not breached by transcending temporal divisions, as is commonly done, in order to con-

In so concluding, the majority appears to me to misconceive the intent of the statutues and unjustifiably to trim traditional trial court authority.

II

I readily agree with the premise of the majority that payment of the tax assessed and due at the time of the filing of an appeal is a jurisdictional prerequisite to Superior Court consideration of an individual challenge.[3] See D.C. Code 1973, § 47-2403; George Hyman Construction Co. v. District of Columbia, D.C.App., 315 A.2d 175 (1974); District of Columbia v. Berenter, 151 U.S. App.D.C. 196,

---

2 (cont'd) consider together all of the tax considerations which are integral parts of a whole process, proceeding, or statutory scheme. See Arrowsmith v. Commissioner, 344 U.S. 6, 8-9 (1952).

3 Nonetheless, we --in a unanimous written opinion written by the author of the majority opinion in this case--expressly have ruled that the exhaustion of available administrative remedies may be excused in appropriate circumstances as a prerequisite for Superior Court jurisdiction. See District of Columbia v. Green, D.C.App., 310 A. 2d 848, 853 (1973). See also Tumulty v. District of Columbia, 69 App.D.C. 390, 400, 102 F.2d 254, 264 (1939).

466 F.2d 367 (1972). Where the majority may be misled in its reliance upon this precept is in assuming, presumably based on the cases just cited, that the payment of the tax gives the court jurisdiction over, or, more accurately, specifically limits its authority in granting relief to, only the actual amount paid. This, I believe, is an incorrect assumption. The Hyman and Berenter cases concerned only a particular fiscal year's taxes. Quite property those cases required payment in full of the tax for the year in question before the challenge to the particular taxes involved could be adjudicated. In neither case was the court faced with an issue similar to that presented here, and neither case even contemplated the problem. Without more substantial justification, it scarcely may be said that those two cases are dispositive of this one. I

consider the statutory scheme to encompass a decidedly broader scope than the situations presented in Hyman and Berenter.

Section 47-709 speaks primarily in terms of a property's "valuation". It states, in part, that the "valuation. . . shall constitute the basis of taxation for the next succeeding year and until another valuation is made according to law. . . ." Further, any person aggrieved by any valuation (or assessment or equalization) may appeal in the manner provided in § 47-2403.[4] Thus, it is the valuation

4 The term "valuation" refers to both (1) the process by which the Board of Assistant Assessors determines and assigns a fair market value to a particular piece of real property, and (2) the amount so assigned as the value. Such a determination requires an "actual view" and the enlistment of "the best sources of information in [the Board's] reach". D.C. Code, 1973, § 47-705. "Assessment" is the figure attained by multiplying the valuation, i.e., the fair market value, by the debasement factor, the percentage of fair market value to which the tax rate is applied. See District of Columbia v. Green, supra note 3 at 851. The assessment, i.e., the assessed value, then is the amount upon which the tax is levied. "Equalization" denotes the process

which underlies § 47-2403.[5] While certainly a dissatisfied taxpayer may contest the actual sum remitted, he is not restricted so narrowly by the statute. He readily may, if his complaint is so couched, challenge the valuation. Jurisdiction for such an appeal is vested in

4 (cont'd) implementing the duty of the Board of Equalizaton and Review "to fairly and impartially equalize the value of real property made by the board of assistant assessors as the basis for assessment." D.C. Code 1973, § 47-708. The equalization "depends directly on a fair and critical assessment". District of Columbia v. Green, supra at 855. The "valuation" or value of a property is, therefore, the foundation of any assessment and of any tax levied upon such an assessment. It is--and remains--the keystone of a particular tax until replaced by a subsequent valuation. D.C. Code 1973, § 47-709.

5 While § 47-2403 speaks literally of an "appeal from the assessment", an assessment is nothing more than a specified percentage of a property's valuation and has no viability separate and apart from the underlying valuation.

the Superior Court by §§ 47-709 and 47-2403. Once the taxpayer has complied with the required procedure, i.e., once he has paid the tax accrued and owed on the valuation in question, the Superior Court has acquired jurisdiction over the valuation as well as over the tax paid, for the two are inextricably intertwined. That valuation, by law, continues to be effective for tax purposes "for the next succeeding year and until another valuation is made according to law". D.C. Code 1973, § 47-709.

I see nothing in the statute which even suggests a truncated jurisdiction, once attached, over the valuation. Rather, the statutory scheme (and particularly the excerpt just quoted, which is an integral part of the statutory provision establishing the right to appeal a valuation) indicates that jurisdiction over the valuation is coextensive with the existence of the

valuation itself.[6] The majority, for some unstated reason, assumes the contrary. In my view, once Superior Court jurisdiction attaches to a valuation pursuant to §§ 47-709 and 47-2403, that jurisdiction remains until a final disposition of the case. Moreover, once the trial court acquires jurisdiction over a particular valuation, that forum not only has the

6 Further support for this conclusion is contained inferentially in the statutory phrase "valuation. . .according to law". There is nothing in the Code signifying any particular limitation on this modifying phrase. Nowhere does either the statute or the majority say that that "law" means statutory law or administrative law or only the law of a particular code section. Rather, "according to law" refers to all applicable law, as codified by the legislature, as implemented by the executive, and as construed by the judiciary. Thus the valuation contemplated in this phrase comprehends and necessarily means a valuation finalized after all allowable means of judicial review have been pursued or waived. Until the "law" has run its course, no valuation is final under § 47-709.

the authority but is obligated to "grant the relief to which the party in whose favor [the judgment] is rendered is entitled, even if the party has not demanded such relief in his pleadings." Super. Ct.Civ. R.54(c).[7]

What is at issue here is not merely a single tax payment. Appellee contested the entire valuation process, particularly the final fair market value determination. The term "valuation" obviously entails more than a finite amount of money for an individual year. It encompasses the deliberative processes of an administrative body culminating in a computation which has a legal

7 Even if the majority correctly decided that Superior Court jurisdiction in cases brought under § 47-2403 is restricted only to the actual tax paid, its opinion fails to state why the court could not grant the appropriate relief to appellee under the authority of Rule 54(c). To say there is no jurisdiction is an insufficient answer, for jurisdiction pertains to two elements, persons and subject matter. Given the fact that the court had jurisdiction over both in the appeal, a question looming and

effect beyond any one year, at least until the process is repeated in a subsequent year. It was this entire administrative course of conduct, its ultimate determination, and its binding effect--both presently and prospectively--from which appellee requested relief and over which the trial court had jurisdiction. The court found that the valuation had been arbitrarily computed, and that it therefore was not legally usable by the Board of Equalization and Review. In my judgment, under these circumstances, Rule 54(c) compelled the trial court's accommodation of appellee for years following 1973 until a new valuation should be made.

7 (cont'd) unanswered is why and how Rule 54(c) can be annulled by the tax statutes.

III

There are further grounds for my disagreement with the majority. I believe not only that jurisdiction over the valuation properly lay in Superior Court and that the court was bound by its rules of civil procedure in deciding appellee's claim, but also that the normal equitable powers of the court are not abridged by § 47-2403 and that the court thus possessed the inherent authority to give relief to the bounds of that actually granted, regardless of the question of specific jurisdiction over the assessment for 1974.

The petitioner complained in the Superior Court that the valuation placed on its property was an arbitrary figure which was arbitrarily arrived at. It sought a reduction in the fiscal 1973 assessment, a refund of overpaid taxes,

and "such other and further relief as the Court may deem just and proper."[8] Its requested relief necessarily was equitable in nature, consistent with the doctrine that the trial court's power to review decisions of the Board of Equalization and Review is that of an equity court. See Hamilton National Bank v. District of Columbia, 81 U.S.App.D.C. 200, 204, 156 F.2d 843, 847 (1946). In such an inquiry, "the whole case, both facts and law, is open for consideration". Ibid. Necessarily the term "whole case" encompasses scrutiny of the valuation mechanics and the court's power to fashion equitable relief affecting the computation procedure. The majority, in an unsupported departure from

8 The petition was filed prior to the issuance of the fiscal 1974 assessment, which, as noted, merely repeated the 1973 figure.

traditional principles of equity, neither acknowledges this concept nor permits its operation. They apparently see in the statutory scheme an intended abridgement of the trial court's traditional equity authority. I see no such diminution in the statute. Further, pertinent case law is decidedly against such a curtailment, at least in the absence of a clear and concrete statutory statement of limitation. Worth quoting are the Supreme Court's comments rejecting an attempted statutory pruning of the "traditions of equity practice" in Hecht Co. v. Bowles, 321 U. S. 321, 329-40 (1944):

> We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determination of courts of equity." Meredith v. Winter Haven, 320 U.S. 228,

> 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. We do not think the history or language of [the statute] compel it. * * * Hence we resolve the ambiguities of [the statute] in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices.* * *

I see no justification for departing from those principles here. Indeed, we specifically have held that where taxpayers can show that in reality they were afforded no effective administrative remedy, the fact

that they have "bypass[ed] the useless administrative procedure" will not deprive the trial court of the power to grant equitable relief. District of Columbia v. Green, D.C.App., 310 A.2d 848, 852-53 (1973). It is plain that any appeal to the Board concerning the 1974 assessment, based as it inevitably would have been on the identical arguments which the Board already had rejected in connection with the 1973 assessment, would have been a futile procedure which the taxpayer should not be penalized for bypassing. Once it is obvious that a repetitious invocation of the full statutory scheme would be an empty gesture, a taxpayer no longer can be said to have "had an adequate remedy at law" and he should be free to seek equitable relief from the court. The fact that appellee did not amend its petition specifically to include

the 1974 assessment does not signify a failure to demand relief.[9] In my view, the trial court acted well within the bounds of its authority in tailoring its order to relieve appellee from the future onus of what the court correctly concluded was an assessment which was "against the evidence and. . .erroneous, arbitrary, and unlawful".

The majority opinion further abrogates the Superior Court's authority in a more particular and troublesome sense. A fair reading of the petition, alleging an arbitrary and unfounded assessment, reflects claims of both statutory and constitutional violations. See Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 442 (1923).

---

9 In any event, as noted supra, the trial court is not limited in granting relief to that which a party formally has requested. See Super.Ct.Civ. R.54(c).

The asserted errors of the Board of Assistant Assessors and the Board of Equalization and Review had both present and prospective effects. The majority in effect holds that the trial court may eliminate constitutional (and statutory) deprivations in the present, but is without authority to redress them prospectively. In my judgment, such a drastic restriction of the trial court's authority and duty requires far more justification than a simplistic dedication to a motion of precision in the area of tax law. To my knowledge, no other case in this jurisdiction has permitted a literal reading of a tax statute to bar a trial court's exercise of its full and legitimate authority.

In Sioux City Bridge Co. v. Dakota County, supra, at 442, the company protested an assessment as "excessive, . . .without evidence and arbitrary", in contravention

of the tax statute and of due process and equal protection guarantees. Particularly, the taxpayer accused the County Board of Equalization of "intentionally and arbitrarily" assessing the property in excess of the lawful figure. Id. at 445. The Supreme Court concluded that equitable relief properly could be utilized to remedy the consequences of the unjustified assessment, even where the relief granted compelled the Board to value the property at less than its "true value" as required by statute. The Court's conclusion was based on the principle that where uniformity and equality were required, they were to be preferred "as the just and ultimate purpose of the law" over a conflicting end. Id. at 446. The statute and circumstances at issue in Sioux City are analogous to those involved here. Of course, the federal

Constitution is the same. Just as the Nebraska statute commanded equitable valuations, so does § 47-705 of our Code dictate that the Board of Assistant Assessors "determine the value. . .in lawful money" of each piece of property; so does § 47-708 require the Board of Equalization and Review "to fairly and impartially equalize"; and so does § 47-709 permit only a valuation that is "made according to law". Just as Fourteenth Amendment due process and equal protection guarantees ensured fairness and rationality in applying the Nebraska tax statute, so does the Fifth Amendment assure reasonable determinations by the District of Columbia tax authorities. I find the trial court's order in the present case fully within the rationale of Sioux City.

Hamilton National Bank v. District of Colum-

bia, supra, posed a similarly analogous situation. The petitioner in that case challenged a particular year's assessment on its gross earnings, charging that the assessment process was discriminatory, improper, and invalid. The court, after discussing the inherent similarity of the Fourteenth Amendment's equal protection guarantee and the Fifth Amendment's promise of due process in the review of administrative proceedings, stated that an interpretation and application of a tax statute which "operate[d] to create a rule out of harmony with the statute, is a mere nullity." 81 U.S.App.D.C. at 203, 156 F.2d at 846 (footnote omitted). The invalid assessment was not merely inoperative for some finite period; it was wholly void, without any effect forthwith and forever. In my judgment, Hamilton National Bank, relying as it did on the Fifth Amend-

ment, the District of Columbia Code, and traditional principles of equity, stands as clear and compelling support for the trial court's order in this case. This is especially so when that opinion is read in conjunction with the Sioux City and Hecht Co. v. Bowles decisions, supra. Only by following the course laid out in those cases may the courts assure a taxpayer of his constitutional and statutory rights to a valuation "fairly and impartially equalize[d]" and "made according to law".

IV

The practical effects of the majority's holding also lead me to reject its correctness. If their conclusion is valid, a taxpayer is obliged to file identical, duplicative lawsuits to challenge successive assessments based on the same valuation. The longer the court process takes on the original suit, the more actions the

taxpayer must file. Such a scenario obviously would result in a pointless waste of time and funds of the taxpayer, the Corporation Counsel, the Superior Court, and this court.

I conclude by expressing the sincere hope that my consternation for the taxpayer's plight over fiscal 1974 (and subsequent years) is unnecessary. The Superior Court decided, and we unanimously agree, that the valuation at issue was without justification and illegal. The Hamilton National Bank case instructs us that the valuation thus is a nullity for all purposes.[10] Given these factors, fairness alone dictates that the District of Columbia should refrain from collecting taxes,

---

10 "It is fundamental that an assessment must be validly made before tax liability can possibly accrue to the taxpayer." Tumulty v. District of Columbia, supra note 3, 69 App.D.C. at 400, 102 F.2d at 264.

for fiscal years subsequent to 1973, based on the void valuation. The proper course, notwithstanding the majority's hypertechnical holding as to the trial court's jurisdiction in the case before it, would be for the tax collector to rely on the valuation and assessment fixed by the Superior Court and affirmed by us as legal for the computation of the tax due "until another valuation is made according to law". D.C. Code 1973, § 47-709.

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED FEB 27 1976

ALEXANDER L. STEVAS
Clerk

NO. 8790

THE DISTRICT OF COLUMBIA
A Municipal Corporation, and
WALTER E. WASHINGTON, and
KENNETH BACK,

Appellants,

v. Tax 2214

ARTHUR H. KEYES, JR., and
LUCILLE KEYES,
On behalf of themselves and
others similarly situated,

Appellees

BEFORE: Kelly and Gallagher, Associate Judges, and Pair, Associate Judge, Retired.

O R D E R

This cause came on for consideration on the record on appeal and the Court heard argument of counsel. A question has arisen which the parties did not cover in their briefs, and accordingly, the Court desires the parties to submit supplemental memoranda addressed to the following

question:

Bearing in mind (a) that this Court in District of Columbia v. Green (310 A. 2d 848 (1973) specifically approved the trial court's finding that an injunctive remedy was available in that case due to the "exceptional and extraordinary" circumstances there presented (at 853) and (b) that this Court recently reiterated that proposition in District of Columbia v. Burlington Apartment House Co. T/A The Vurlington Hotel., D.C.App., ___ A.2d ____(no. 7986, January 29, 1976) at pages 4-5 of the slip opinion, are the appellees in this case barred from the relief sought by reason of their failure to pursue their statutory remedies in seeking refunds for the fiscal year here involved? In addressing themselves to the question, the parties should discuss District of Columbia v. Berenter, 151 U.S.App. 196, 466 F.2d 367 (1972).

Counsel for appellants shall cause their supplemental memorandum to be filed on or before March 8, 1976, and counsel for appellees shall cause their memorandum to be filed on or before March 15, 1976, and counsel shall cause their respective pleadings to be personally served on opposing counsel.

Per Curiam

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7986

DISTRICT OF COLUMBIA, APPELLANT,

v.

BURLINGTON APARTMENT HOUSE COMPANY,
t/a The Burlington Hotel, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Hon. George H. Revercomb, Trial Judge)

(Argued en banc May 10, 1976 Decided June 13, 1977)

Melvin J. Washington, Assistant Corporation Counsel, with whom *C. Francis Murphy*, Corporation Counsel at the time the brief was filed, and *Henry E. Wixon*, Assistant Corporation Counsel, were on the brief, for appellant.

Christopher Sanger for appellee.

Before REILLY, *Chief Judge*,* and KELLY, FICKLING,** KERN, GALLAGHER, NEBEKER, YEAGLEY, HARRIS, and MACK, *Associate Judges*.

---

* Judge REILLY was Chief Judge of the Court at the time of oral argument; his status changed to Chief Judge, Retired, on September 27, 1976. He participated in all phases of the en banc disposition of this case.

** Judge Fickling participated at oral argument, but died on March 6, 1977.

Opinion for the Court by *Associate Judge* HARRIS, with whom former *Chief Judge* REILLY and *Associate Judges* KERN, NEBEKER, and YEAGLEY concur.

Opinion by *Associate Judge* KELLY, concurring in part and dissenting in part, with whom *Associate Judges* GALLAGHER and MACK concur, at p. 12.

HARRIS, *Associate Judge*: On January 29, 1976, a division of this court unanimously affirmed (with a minor arithmetical adjustment) the trial court's reduction of a real property tax assessment which had been made for fiscal year 1973. In the same opinion, by a vote of 2-1, the majority of the division reversed that aspect of the trial court's order which extended the reduced assessment to fiscal year 1974 (and future years, until a new assessment could be made) on the ground that the trial court lacked jurisdiction to do so. On April 23, 1976, we granted appellee's petition for rehearing en banc and vacated the January 29 decision. The question of the trial court's authority to apply the reduced assessment to 1974 and succeeding years has been reargued and reconsidered en banc. We now hold that the trial court's determination that its adjusted assessment constituted the lawful assessment "for all succeeding years until another valuation is made according to law" was correct and it is affirmed.

Appellee (hereinafter Burlington) is the owner of a parcel of land in the District of Columbia which is officially designated as Lot 97, Square 214. The land is improved by a structure known as The Burlington Hotel, and is located on Vermont Avenue, just south of Thomas Circle.

In February 1972, the District of Columbia issued an assessment of real estate taxes for fiscal year 1973 for

the property. It was predicated upon a valuation of $92.30 per square foot. On March 27, 1972, Burlington appealed to the District of Columbia Board of Equalization and Review. D.C. Code 1973, §§ 47-708, -709. *See* D.C. Code 1976 Supp., § 47-646.[1] Following a hearing, the Board issued an order reducing the fair market value of the land for tax purposes to $84.61 per square foot. Burlington then paid its 1973 real property tax liability, based on the Board's valuation, and filed a timely petition in the Superior Court contesting the Board's order. D.C. Code 1973, § 47-2403.[2]

In the petition filed in the trial court, Burlington challenged the Board's assessment as being based on an

---

[1] Substantial revisions of the statutory provisions affecting real property tax assessments were made in 1974. *See* District of Columbia Real Property Tax Revision Act of 1974, P.L. 93-407, §§ 401-29, 88 Stat. 1036 (effective July 1, 1975), D.C. Code 1976 Supp., §§ 47-641 to -646. We refer herein to the Code sections which are applicable to the instant litigation, since this case arose prior to the enactment of the present laws.

[2] For convenience we define briefly some of the taxation concepts used in this opinion. The term "valuation" refers to both (1) the process by which the Board of Assistant Assessors determines and assigns a fair market value to a particular piece of real property, and (2) the amount so assigned as the value. *See* D.C. Code 1973, § 47-705. "Assessment" is the figure attained by multiplying the valuation, *i.e.*, the fair market value, by the debasement factor, the percentage of fair market value to which the tax rate is applied. *See District of Columbia v. Green*, D.C.App., 310 A.2d 848, 851 (1973). The assessment, *i.e.*, the assessed value, is the amount upon which the tax is levied. "Equalization" denotes the process implementing the duty of the Board of Equalization and Review "to fairly and impartially equalize the value of real property made by the board of assistant assessors as the basis for assessment." D.C. Code 1973, § 47-708.

arbitrary and unfounded overvaluation of the fair market worth of the real estate. One of Burlington's expert witnesses testified that the fair market value of the property was $64.00 per square foot; the other placed it at $67.20. Each witness supported his conclusion by citing sales of properties of comparable size in similar downtown Washington locations.[3] The District's expert witnesses, relying upon different sales, disputed Burlington's evidence and conclusions on fair market value.

The trial court found that the District's assessment of Burlington's property was "ostensibly against the evidence and was erroneous, arbitrary, and unlawful." The court valued the property at $67.00 per square foot for fiscal years 1973 and 1974, and ordered the District to refund a tax overpayment of $15,308.72, with interest, within ten days of its order.

Preliminarily, we conclude—as did the division which originally considered this appeal—that the trial court was in error in directing the District to refund the overpayment within ten days of its order. D.C. Code 1973, §§ 47-1016 and -2407 control the refunding of taxes when it has been "finally determined" that such taxes were erroneously paid. The requisite finality is defined in § 47-2404 of the Code, and it is not satisfied by the mere lapse of ten days after the entry of the trial court's order.

The District also contends that it was error for the trial court to have excluded the evidence of a prior offer by Burlington to sell the property. The deposition of Burlington's president reflected that in 1972, he had

[3] The District and Burlington agreed that the existing improvements on the land are of insignificant value, and that the hotel would have to be demolished for the land to be put to its "highest and best use."

authorized a possible sale of the property at $70.00 per square foot, and that subsequently the company had asked $75.00 per square foot. No option to purchase resulted from those offers. The District claims that an owner's asking prices should be allowed in evidence as admissions and as probative of fair market value.

While we accept that contention,[4] that evidentiary error was harmless in view of other testimony given at trial. The District had presented other credible evidence on which the court could have based a finding that the value of the property exceeded the owner's asking price of $75.00 per square foot, had it been so persuaded.[5]

The District's next contention is that the trial court's valuation of the property at $67.00 per square foot is against the weight of the evidence. We are, of course, bound to accept the trial court's findings unless they are clearly erroneous. *District of Columbia v. Neyman*, 135 U.S.App.D.C. 193, 196, 417 F.2d 1140, 1143 (1969); *see* SUPER. CT. CIV. R. 52(a). As we have stated, Burlington presented extensive expert testimony in support of a lower appraisal of the fair market value. In its findings of fact, the trial court indicated which sales of properties

[4] *See United States v. Certain Land in Baltimore County, Maryland*, 209 F. Supp. 50, 56 (D.Md. 1962); *Durika v. School District of Derry Township*, 415 Pa. 480, 203 A.2d 474 (1964); *cf. Mark v. City of Indianapolis*, 247 Ind. 511, 219 N.E.2d 434 (1966) (evidence of owner's asked rent admissible).

[5] Nonetheless, we agree with the trial court's observation that an unacted-upon offer to sell is not highly probative of true value in the context of an assessment proceeding. A landowner's offering price is likely to be exaggerated, as a starting point for bargaining. That, however, goes to the evidence's weight, rather than its admissibility.

it considered relevant and persuasive evidence on the question of fair market value.[6] Based upon a consideration of those sales of comparable property and upon other relevant factors, such as the character of the neighborhood and its development potential, the court concluded that the market value of the property as of July 1, 1972, was $67.00 per square foot. In our judgment, the trial court's determination that the sales relied upon involved property comparable to the Burlington parcel and its ultimate finding of true market value were reasonable, supported by the evidence, and not clearly erroneous. Accordingly, we affirm the trial court's conclusion that the assessment to which Burlington was subjected was arbitrarily excessive and affirm the reduced assessment.[7]

The central issue which prompted our en banc consideration of this case was not, however, whether the trial court was correct in granting Burlington relief from an overly high assessment, but rather the proper scope of the relief to be awarded.

---

[6] Contrary to the District's assertions, the sales used by Burlington to support its estimated valuation were competent evidence so long as they did not result from foreclosure or other legal compulsion. *District of Columbia Redevelopment Land Agency v. 61 Parcels of Land*, 98 U.S.App.D.C. 367, 368, 235 F.2d 864, 865 (1956); *Baetjer v. United States*, 143 F.2d 391, 397 (1st Cir.), *cert. denied*, 323 U.S. 772 (1944). The motivations and circumstances of the sales go to the weight of the evidence, and not to its admissibility. *District of Columbia Redevelopment Land Agency v. 61 Parcels of Land*, *supra*, at 369, 235 F.2d at 866.

[7] Both parties agree that the trial court made a slight arithmetical error in its determination of Lot 97's total debased assessed value, due to the inadvertent inclusion of a small adjacent parcel owned by appellee. The property's final debased assessment value should be $1,846,868.40, and not $1,871,334.79 as stated by the trial court.

The relevant portion of the trial court's order stated that "the aforesaid reduced assessment . . . shall constitute the full and lawful assessment . . . for District of Columbia fiscal year 1973, and, pursuant to District of Columbia Code § 47-709, for all succeeding years until another valuation is made according to law." It further ordered the District to "amend its official real property tax ledgers and other real property tax and assessment records pertaining to . . . fiscal years 1973 and 1974 to reflect the aforementioned reduced assessment."

The District argues that the trial court had no authority to award relief for any fiscal year other than 1973. That position is based upon the contention that Burlington did not comply with the requisite statutory provisions so as to confer jurisdiction upon the trial court over taxes for succeeding years. In further support of its argument, the District cites the principle that every tax year is a distinct entity. It also stresses that its evidence at the hearing was directed solely to fiscal year 1973.

We begin by clarifying what is not at issue in this case. Unquestionably there are jurisdictional prerequisites to the Superior Court's consideration of a taxpayer's challenge. *See* D.C. Code 1973, §§ 47-709, -2403, and -2404; D.C. Code 1976 Supp., § 47-646(i). *See also George Hyman Construction Co. v. District of Columbia*, D.C. App., 315 A.2d 175 (1974); *District of Columbia v. Berenter*, 151 U.S.App.D.C. 196, 466 F.2d 367 (1972). Prior payment of the tax assessed and due at the time of the filing of a petition in the Tax Division of the trial court is one such prerequisite. Under certain circumstances, the taxpayer first must complain to the Board of Equalization and Review before seeking relief in the trial court. It is undisputed that Burlington met all applicable requirements to invoke Superior Court jurisdiction over the

challenged 1973 tax liability. The crucial inquiry concerns the legal effect to be accorded the trial court's modification of the Board's valuation until such time as the District undertakes a genuine reappraisal of the property.[8] All relevant authorities, including prior decisions of this court, the statutory structure, the trial court's rules of procedure, and traditional equitable principles, lead us to conclude that the trial court's valuation must constitute the continuing basis for taxation until there is a superseding valuation which has been made according to law.

In our view, the only reasonable construction of the statutory scheme dictates that once jurisdiction has attached in the trial court to consider the legality of a particular valuation, the court's valuation must remain binding until it is superseded by a lawful substitute. That the trial court has authority to review the valuation is made clear by D.C. Code 1973, § 47-709. *See* D.C. Code 1976 Supp., § 47-646(i). A statutory scheme which calls for the equalization of a valuation by the Board, which then vests power in the trial court to "affirm, cancel, reduce, or increase the assessment", and finally, which provides that such a "valuation . . . shall constitute the basis of taxation for the next succeeding year and until another valuation is made ac-

[8] Prior to the hearing on the contested 1973 assessment, Burlington received a notification from the District of the assessment on the property for fiscal year 1974. The figure thus conveyed was exactly the same as that which had been set for the previous fiscal year by the Board of Equalization and Review, which then was in the process of being disputed in Superior Court. It is clear that the 1974 figure was not based upon a reassessment utilizing updated sources of information, but rather was simply a routine repetition of the challenged 1973 assessment.

cording to law . . ." must be interpreted to contemplate that the valuation to be given binding respect is the one which has been finalized after all allowable means of administrative and judicial review have been pursued or waived.[9] Thus, a final judgment of the Superior Court on the lawful assessment of a particular property must be treated in the same manner as an equalized assessment from the Board, that is, it becomes the basis for taxation until a subsequent reassessment has been made according to law. Any other reading of the statutory scheme would result in a judicial subordination to the Board of Equalization and Review, the precise body over whose actions the court has been granted the power of review. Once the Superior Court has jurisdiction over a valuation pursuant to §§ 47-709 and -2403 of the Code, that jurisdiction is coextensive with the existence of the valuation itself.

This construction, in addition to flowing naturally from the language of the tax statutes, also avoids imposing a Sisyphean burden upon a taxpayer in Burlington's position. If we were to accept the District's argument, Burlington would be compelled to contest a particular assessment—already in the process of being shown to be unlawful—through the Board to the Superior Court in every successive fiscal year. Such a multiplicity of litigation on a single issue not only would be impractical and inequitable, but also has been deemed unwarranted by this court. In *District of Columbia v. Green*, D.C. App., 310 A.2d 848 (1973), we held that when tax-

[9] While § 47-2403 speaks literally of an "appeal from the assessment", an assessment is nothing more than a specified percentage of a property's valuation and has no viability separate and apart from the underlying valuation. The value of a property is the foundation of both an assessment and the amount of the tax levied upon such an assessment.

payers can show that in reality they had no effective administrative remedy, the fact that they have "bypass[ed] the useless administrative procedure" will not deprive the trial court of the power to grant equitable relief. It is plain that any appeal to the Board concerning the 1974 assessment, based as it inevitably would have been on the identical arguments which the Board already had rejected in connection with the 1973 assessment, would have been a futile procedure which the taxpayer should not be penalized for bypassing. We do not believe Congress intended that a taxpayer should be required repeatedly to invoke an empty statutory pattern in order to seek and obtain adequate relief from the court. Additionally, once the trial court has acquired jurisdiction over a particular valuation (or assessment or equalization), that forum not only has the authority but also is obligated to "grant the relief to which the party in whose favor [the judgment] is rendered is entitled, even if the party has not demanded such relief in his pleadings." SUPER. CT. CIV. R. 54(c).[10]

Of decisional significance is the fact that Burlington contested the entire valuation process, not merely a single tax payment. The term "valuation" entails more than a finite amount of money for a particular year. It encompasses the deliberative processes of an administrative body culminating in a computation which has a legal effect beyond any one year, at least until the process is undertaken again in a subsequent year. It was this whole administrative course of conduct, its ultimate determination, and its binding effect—both presently and prospectively—from which Burlington requested relief and over which the trial court had jurisdiction. The court found that the valuation had been arbitrarily computed, and that it therefore was not legally usable as a basis for taxation. Under these circumstances, Rule 54(c) compelled the trial court's accommodation of Burlington for years following 1973—until a new valuation was made.

[10] While we do not consider the fact that Burlington did not amend its petition specifically to include the 1974 assessment to constitute a specific failure to demand relief, the trial court is not limited in granting relief to that which a party formally has requested.

Should additional justification for our holding be necessary, we believe it is found in the traditional and inherent powers of a court. As stated in *Hamilton National Bank v. District of Columbia*, 81 U.S.App.D.C. 200, 204, 156 F.2d 843, 847 (1946), "the whole case, both facts and law, is open for consideration." *See* D.C. Code 1973, § 47-2403. Necessarily the term "whole case" encompasses scrutiny of the valuation mechanics and the court's power to fashion effective relief from the computation procedure. While our reading of the District's tax statutes does not contravene the court's power to exercise its full authority, any conflict between the literal language of the Code and the trial court's duty to ensure the lawful and fair imposition of taxes must be resolved in favor of permitting broad trial court action. *See Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923).

Finally, where an assessment is based not upon a "valuation made according to law" but rather upon a figure determined by the court to be "erroneous, arbitrary, and unlawful," the figure thus rejected must be considered a mere nullity, incapable of valid future applicability. *See Hamilton National Bank v. District of Columbia, supra.*

We perceive no undue onus to the government resulting from our sustaining the trial court's granting of

prospective effect to the reduced assessment. It requires the District to do no more than that which it already was statutorily required to do, that is, to make a new valuation of appellee's property according to law. This mandate forecloses continued reliance upon a figure judicially determined to be arbitrarily excessive, and the District may not validly contend that a new "valuation according to law" has been satisfactorily achieved by the mere mailing of a later notice of assessment based upon the identical, voided figure. Congress surely envisioned a valuation process with more substance than that when it employed the statutory phrase "according to law."

In conclusion, we again note the trial court's minor error in arithmetical computation, *see* note 7 *supra*, and the premature granting of an immediate refund of the taxes erroneously paid. In all other respects, the order appealed from is affirmed.

Affirmed as modified.

KELLY, *Associate Judge*, with whom GALLAGHER and MACK, *Associate Judges*, join, concurring in part and dissenting in part: After a full hearing as to an assessment for fiscal year 1973, the trial court reduced the Board of Equalization and Review's equalized assessment of appellee's property and provided in its order that "the aforesaid reduced assessment . . . shall constitute the full and lawful assessment . . . for District of Columbia fiscal year 1973, and pursuant to District of Columbia Code 1973, § 47-709,[1] for all succeeding years until another valuation is made according to law."

---

[1] D.C. Code 1973, § 47-709, provides:

> The valuation of the real property made and equalized as aforesaid shall be completed not later than the first Monday of May annually. The valuation of said real property made and equalized as aforesaid shall be approved by the Commissioner of the District of Columbia not later than July 1, annually, and when approved by the Commissioner shall constitute the basis of taxation for the next succeeding year and until another valuation is made according to law . . . .

The decision as to fiscal year 1973 has full support in the evidence and I agree it should be affirmed. Even before this evidentiary hearing, however, another valuation of appellee's property had been made according to law for fiscal year 1974 which, under the statutory scheme in effect at the time,[2] had become final some months before the court's decision. Review of that valuation had thus been foreclosed six months in advance of the court's ruling because of appellee's failure to follow the mandatory statutory procedures to contest the 1974 assessment, or even to file a simple amendment to its petition pending in the Tax Division of Superior Court to include a refund request for fiscal year 1974.[3]

The statutory scheme for relief from allegedly inaccurate fiscal year assessments is found in D.C. Code 1973, §§ 47-709, -2403, and -2404, and the administrative remedies outlined there must be exhausted before a taxpayer may pursue court action. Sections 47-709 and -2403 provide that where the assessment for the following fiscal year is received before March 1, or after March 1, but without an increase in valuation, a

---

[2] The timetable for establishment, notice, and appeal of real estate assessments was substantially revised by the District of Columbia Real Property Tax Revision Act of 1974, P.L. 93-407, §§ 401-29, 88 Stat. 1036 (effective July 1, 1975).

[3] Since the pleadings were not amended, no testimony was taken on the 1974 assessment.

complaint must be made to the Board of Equalization and Review which sits from January 1 through April 1 for that particular purpose (D.C. Code 1973, § 47-708). If such complaint is made and adversely decided the taxpayer may, after all taxes for the entire fiscal year are paid, appeal to the Superior Court after October 1 and for the six months following. Where, however, there is an increase in valuation and notice in writing is received after March 1, a complaint to the Board is unnecessary. An appeal can then be taken to the Superior Court, after all taxes for the fiscal year have been paid, beginning October 1 and for six months following.

In the instant case, notice of the fiscal year 1974 assessment of $2,332,400.00 was received by appellee sometime after March 27, 1973, and was identical in amount to the Board's equalized assessment for fiscal year 1973.

The statutory scheme does not require by its terms that real property be revalued each year, but it does require a designation of value for the tax rolls and notification of that value to the taxpayer.

A majority of the en banc court, at the urging of appellee, concludes without basis that because the fiscal 1974 assessment of appellee's property was the same as the equalized figure for fiscal 1973, no subsequent valuation of the property was made according to law.[4] There is, of course, no testimony of record from which such

---

[4] D.C. Code 1973, § 47-705, provides:

> Said Board of Assistant Assessors shall, from actual view and from the best sources of information in its reach, determine the value of each separate tract or lot of real property . . . .

a conclusion could be drawn. Moreover, it is incorrect to say, as does the majority, that the trial court found the fiscal 1974 assessment figure "erroneous, arbitrary and unlawful." It would be error if it had in view of the lack of any testimony with respect to that year.

The majority also turns to the "traditional and inherent powers of a court" to bolster its holding in this case. That phrase, without so stating, is of course an obvious reference to a court's traditional and inherent power to grant equitable relief. The fact is, however, that appellee is pursuing a statutory remedy and seeks no relief in equity if, indeed, any such relief is available. Additionally, the statute which spoke to the scope of judicial review in *Hamilton National Bank v. District of Columbia*, 81 U.S.App.D.C. 200, 156 F.2d 843 (1946), upon which the majority relies, differed in one significant aspect from that under which this suit is brought. In *Hamilton National Bank v. District of Columbia, supra* at 204, 156 F.2d at 847, the court said:

> Our power to review its [Board of Tax Appeals] decisions is "as under the equity practice in which the whole case, both facts and law, is open for consideration",—"the scope of a review of an equity court." . . . [Footnote omitted.]

In an earlier case the Supreme Court spoke with some wonder of the statute, saying, in *District of Columbia v. Pace*, 320 U.S. 698, 701 (1944):

> The provisions for review of Board of Tax Appeals decisions present complexities almost as baffling as the test of taxability itself. Section 4(a) of the Act creating the Board of Tax Appeals for the District of Columbia pro-

vides that its decisions may be reviewed by the Court of Appeals and that upon such review the court "shall have the power to affirm, or if the decision of the board is not in accordance with law, to modify or reverse the decision of the Board, with or without remanding the case for hearing, as justice may require." 52 Stat. 371, D.C. Code 1940, § 47-2404(a). Had this been all, a strong case would be made for applying the rule of finality applicable to the Federal Board of Tax Appeals, now the Tax Court of the United States. Dobson v. Commissioner, 64 S. Ct. 239, decided December 20, 1943. However, the same organic act contains another and qualifying provision that is not to be found in the acts creating the Tax Court: "The findings of fact by the board shall have the same effect as a finding of fact by an equity court or a verdict of a jury." 52 Stat. 371, D.C. Code 1940, § 47-2404(a). Since findings of fact by an equity court and the verdict of a jury have from time immemorial been subject to different rules of finality it is puzzling to know what the draftsmen of this section meant by including both in the one rule for reviewing Board of Tax Appeals findings.

Since D.C. Code 1973, § 42-2404(a) had no such provisional language when this case arose, the *Hamilton* case is inapposite.

In *District of Columbia v. Green*, D.C.App., 310 A.2d 848, 852-53 (1973), we stated that in "exceptional and extraordinary" circumstances (deliberate discrimination between members of one class of property owners), equitable relief could be sought to enjoin the assessment of a

tax. However, the facts of this case are such that resort to equitable relief is inappropriate. Appellee had an adequate remedy at law to contest his 1974 assessment but failed to invoke the jurisdiction of the Superior Court. *See also District of Columbia v. Keyes*, D.C.App., 362 A.2d 729 (1976).

The time sequence here, while it may be unusual, did not preclude appellee from complaining of the 1974 assessment to the Board of Equalization and Review and, had it been unsuccessful, paying the tax and appealing to Superior Court. Appellee's failure to meet the jurisdictional requirement is, in my judgment, decisive to the invalidity of the court's order with regard to fiscal year 1974.[5] *District of Columbia v. Keyes, supra; George Hyman Construction Co. v. District of Columbia*, D.C. App., 315 A.2d 175 (1974); *District of Columbia v. Berenter*, 151 U.S.App.D.C. 196, 466 F.2d 367 (1972).

I would affirm the trial court's decision relating to fiscal year 1973, and reverse as to fiscal year 1974.

---

[5] Rule 54(c) hardly permits the trial court to grant relief precluded by statute.

DISTRICT OF COLUMBIA
COURT OF APPEALS

REC'D JUL 7 1977

Alexander L. Stevas
Clerk

DISTRICT OF COLUMBIA, a Municipal Corporation, and WALTER E. WASHINGTON and KENNETH BACK	:	
Appellants	:	
v.	:	NO. 8790
ARTHUR H. KEYES, JR., and LUCILLE KEYES, On behalf of themselves and others similarly situated	:	
Appellees	:	

MOTION TO THE COURT EN BANC TO WITHDRAW THE MANDATE OF THIS COURT IN NO. 8790 ISSUED APRIL 26, 1977 DURING THIS SAME TERM IN ORDER TO PREVENT INJUSTICE AND GRANT HEARING EN BANC IN NO. 8790 BECAUSE OF DISTRICT OF COLUMBIA v. BURLINGTON DECIDED JUNE 13, 1977

Come now Appellees in the above-entitled case, through counsel, and pray to the entire bench of this Court that it withdraw the mandate of this Court in No. 8790 issued

April 26, 1977 in order to prevent injustice and, following the withdrawal of the mandate, grant a hearing en banc. As grounds therefor appellees state the following:

1. Relief Requested: Appellees move the Court for the following relief:

(a) Withdrawal of the mandate in No. 8790 issued April 26, 1977, and

(b) Granting a hearing en banc.

2. Grounds for Relief.

The panel of the Court which adjudicated the Keyes matter created two basic "due process" problems.

(i) The panel specifically requested the parties to comment on the applicability of Burlington I which had been drafted by a panel containing two of the judges who were considering Keyes. The full Court later vacated Burlington I prior to the

Keyes decision. Nevertheless, the panel decided Keyes on the vacated principle of Burlington I asserting an absence of subject-matter jurisdiction.

(ii) The vacating of Burlington I was communicated to the District but never communicated to counsel for the Keyes taxpayers. This gave the District a one-sided advantage over the Keyes taxpayers and prevented counsel for the taxpayers from taking advantage of the vacating of Burlington I. Only a hearing can redress that damage. At that hearing, counsel can reargue the appeal based on the non-existence of the Burlington I principle.

3. What happened.

District of Columbia v. Keyes, 362 A. 2d 729 (1976) was argued December 5, 1974.

Following briefing and argument, on February 27, 1976, the panel (Judges Kelly, Gallagher and Pair) issued an Order as follows:

> This cause came on for consideration on the record on appeal and the court heard argument of counsel. A question has arisen which the parties did not cover in their briefs, and accordingly, the Court desires the parties to submit supplemental memoranda addressed to the following question:
>
> Bearing in mind (a) that this Court in District of Columbia v. Green, (310 A.2d 848 (1973)) specifically approved the trial court's finding that an injunctive remedy was available in that case due to the "exceptional and extraordinary" circumstances there presented (at 853) and (b) that this Court recently reiterated that proposition in District of Columbia v. Burlington Apartment House Co. T/A The Burlington Hotel, D.C.App., A.2d ___ (No. 7986, January 29, 1976) at pages 4-5 of the slip opinion, are the appellees in this case barred from the relief sought by reason of their failure to pursue their statutory remedies in seeking refunds for the fiscal year here involved? In addressing themselves to the question, the parties should discuss District of

Columbia v. Berenter, 151 U.S. App. 196, 466 F.2d 367 (1972). (Emphasis supplied.)

Counsel for appellants shall cause their supplemental memorandum to be filed on or before March 8, 1976, and counsel for appellees shall cause their memorandum to be filed on or before March 15, 1976, and counsel shall cause their respective pleadings to be personally served on opposing counsel.

Per Curiam

The District filed its memorandum on March 15, 1976. Taxpayers filed their memorandum on March 24, 1976. On April 23, 1976 this Court vacated the January 29, 1976 Burlington I opinion. See page 2 slip opinion in D.C. v. Burlington decided June 13, 1977 (Burlington II).

On April 23, 1976, counsel for the District of Columbia was notified that Burlington I had been vacated. Counsel for the Keyes taxpayers was never so notified.

Keyes was decided on July 23, 1976 specifically on the Burlington I principle, but without mentioning Burlington I by name. Taxpayers moved timely on September 16, 1976 for rehearing and hearing en banc. Of course, taxpayers did not include in that motion the overwhelming argument that Keyes had been decided on the Burlington I principle after Burlington I had been vacated. They could not have included this argument because only the District was informed that Burlington I had been vacated.

4. What harm did this do?

What happened caused two kinds of harm: substantive and procedural.

(A) The substantive harm. The key holding in Keyes was to some extent forecast in the February 27, 1976 question to counsel: viz: "Are the Appellees in this case barred from relief sought by reason

of their failure to pursue their statutory remedies in seeking refunds for the fiscal year here involved?" In other words, were the Keyes taxpayers barred from all jurisdiction in the Superior Court to have a tax refund because they had not first taken their case to the Board of Equalization and Review?

The only case in the District of Columbia that had ever supported such a principle was Burlington I.

But, before Keyes was decided, Burlington I was vacated by the full Court without notice to counsel for taxpayers. Keyes was then decided on the Burlington I principle of "failure to pursue their statutory remedies."

Let us look at this Court's opinion in Keyes.

> Recovery of taxes illegally or erroneously assessed and voluntarily paid was not permitted at common law and is a matter within the purview of the legislative branch. Therefore, refunds of taxes so assessed and paid will not be made absent an authorizing statute. District of Columbia v. McFall, 88 U.S. App.D.C. 217, 188 F.2d 991 (1951); Lindner v. District of Columbia, D.C.Mun.App., 32 A.2d 540 (1943). Under the statutory procedure applicable to this case, the recovery of refunds through appeal to the Superior Court requires, as a first step, a complaint to the Board of Equalization and Review. Subject matter jurisdiction of the Superior Court does not attach until that prerequisite has been satisfied, and a refund based on a final determination of the Superior Court presupposes that the taxpayer has complied with the procedure mandated by the legislature. If "aggrieved" for any reason, the taxpayer must appeal within the permitted time to the Board of Equalization and Review. D.C. Code 1973 § 47-709. This was not done in this case. The taxpayers failed to follow their administrative remedies for fiscal year 1973. (Keyes, 362 A.2d 732-3) (Emphasis supplied.)

Further, the Court issued a warning that taxpayers would "bypass the Board at great peril." (Keyes, Footnote 11, 362 A. 2d, supra at 734)

11. We note that the fiscal year 1974 taxpayers who resorted to the Board of Equalization and Review and raised the issue of unequal debasement factors found the Board unresponsive to their arguments. Hence, in Green, where only injunctive relief was sought, we stated that a taxpayer in that case had "no meaningful ability to challenge his assessment at all" because the Board declined to inquire into the non-judgmental aspects of the assessment process. District of Columbia v. Green, supra at 856. This was one of the extraordinary circumstances upon which the grant of injunctive relief in Green was based. However, the fact that an administrative body may wrongly perceive the nature or scope of its powers or responsibilities in a given instance is not a justification for bypassing that body in all instances when it is an essential element in a procedure of purely statutory origin. In fact, it would be a rare instance when taxpayers would not bypass the Board at great peril.

The substantive harm in all this is that not one word of this was the decided law of the District of Columbia on the date the Keyes decision came down. Burlington I, which had said exactly this, had been withdrawn and vacated. There was no hold-

ing in any other decision in the District that bypassing the Board excluded all jurisdiction in the Superior Court to hear a tax refund case.

Nothing sustained the key sentence in Keyes: "Subject matter jurisdiction does not attach until that prerequisite (complaint to the Board) has been satisfied."

When the Burlington case was ultimately decided in 1977, following reargument en banc, (Burlington II) the principle of Burlington I was specifically repudiated.

> We begin by clarifying what is not at issue in this case. Unquestionably there are jurisdictional prerequisites to the Superior Court's consideration of a taxpayer's challenge. See D.C. Code 1973, §§ 47-709, -2403, and -2404; D.C. Code 1976 Supp., § 47-646(i). See also George Hyman Construction Co. v. District of Columbia, D.C.App., 315 A.2d 175 (1974); District of Columbia v. Berenter, 151 U.S.App.D.C. 196, 466 F.2d 367 (1972). Prior payment of the tax assessed and due

> at the time of the filing of a petition in the Tax Division of the trial court is one such prerequisite. Under certain circumstances, the taxpayer first must complain to the Board of Equalization and Review before seeking relief in the trial court. (Emphasis supplied.)

What are the "certain circumstances" which require prior complaint to the Board?

The answer is more obviously defined by stating the circumstances where prior complaint is not required.

As this Court said: (Burlington II, slip opinion, pp. 9-10)

> If we were to accept the District's argument, Burlington would be compelled to contest a particular assessment--already in the process of being shown to be unlawful--through the Board to the Superior Court in every successive fiscal year. Such a multiplicity of litigation on a single issue not only would be impractical and inequitable, but also has been deemed unwarranted by this court. In District of Columbia v. Green, D.C.App., 310 A.2d 848 (1973), we held that when taxpayers can

> show that in reality they had no effective administrative remedy, the fact that they have "bypass[ed] the useless administrative procedure" will not deprive the trial court of the power to grant equitable relief. It is plain that any appeal to the Board concerning the 1974 assessment, based as it inevitably would have been on the identical arguments which the Board already had rejected in connection with the 1973 assessment, would have been a futile procedure which the taxpayer should not be penalized for bypassing. (Emphasis supplied.)

This is exactly the situation in Keyes, a class action for 33,000 taxpayers on exactly the same single issue, where there can be no denial of "multiplicity of litigation", "useless administrative procedure" and "futile procedure".

Even more striking is the effect of the dissenting opinion in Burlington II, which was signed by the two judges who had written the majority opinion in Keyes.[1/] It says:

> The statutory scheme for re-

1/ Judge Pair, now retired, was also on the Keyes panel.

> lief from allegedly inaccurate fiscal year assessments is found in D.C. Code 47-709 et al. and the administrative remedies outlined there must be exhausted. . . Appellee had an adequate remedy at law to contest his 1974 assessment but failed to invoke the jurisdiction of the Superior Court. . .D.C. v. Keyes. (slip opinion, pp.13-17)

How can all this be summarized?

Keyes was decided by two judges[1/] based on a legal principle of subject-matter jurisdiction contained in a vacated preliminary Burlington opinion, which was followed by a final Burlington opinion declaring exactly the opposite principle of subject-matter jurisdiction. And the two judges who decided Keyes filed a dissent in the final Burlington opinion citing Keyes as the support for their dissent.

Here is the ultimate bootstrap on which 33,000 taxpayers are deprived of their just recovery on the basis of an

1/ Judge Pair, now retired, was also on the Keyes panel.

asserted absence of subject-matter jurisdiction.

(B) The Procedural Harm. The Corporation Counsel as counsel in Burlington, was notified in the Burlington case on April 23, 1976 that Burlington had been withdrawn and vacated and that the case had been set for argument en banc. Counsel for the Keyes taxpayers who were not counsel in Burlington was never notified of this either by the Court or by the Corporation Counsel.

The slip opinion in Burlington I was printed and distributed prior to its being withdrawn and vacated. However, the order withdrawing and vacating the opinion in Burlington I was never published anywhere.[2/]

2/ We have verified with the Clerk's Office that the opinions and withdrawals are normally sent to West Publishing Co. and Washington Law Reporter. We have verified with the managing editor of the Washington Law Reporter that Burlington I and the order vacating that opinion were not published because neither was ever received by the Washington Law Reporter. Neither the opinion nor the withdrawal were ever published by the West Publishing Co.

How would anyone know the opinion had been vacated? Up to the date the final opinion was issued in Burlington II, only by checking this Court's docket in Burlington would any lawyer know that the preliminary opinion in Burlington I had been withdrawn and vacated.

Even more striking is the fact that the vacating of Burlington I was apparently not fully circulated in the Corporation Counsel's office.

A series of cases was tried before Judge John G. Penn in the Tax Division of Superior Court, during the period March 1, 1976 to June 1, 1977 in each of which Burlington I was cited to Judge Penn by the Assistants Corporation Counsel with no disclosure that Burlington I had been vacated. It is clear that the particular Assistants Corporation Counsel who were handling those cases were not

aware of the vacating of Burlington I and, obviously, Judge Penn and opposing counsel in these cases were not aware of it.[3/]

3/ (a) D.C.R.L.A. and L'Enfant Plaza Properties, Inc. v. D.C., Tax Docket 2290. Trial Court's Memorandum Order and Trial Findings, citing Burlington I, was entered March 23, 1976 and the final order was signed 4/14/76. District of Columbia's Notice of Appeal was filed 5/14/76 but was subsequently withdrawn by stipulation.

(b) D.C.R.L.A. and Bresler and Reiner, Inc. v. D.C., Tax Docket 2288: Trial Court's opinion and order was dated April 30, 1976 and it cited Burlington I. Final Order was signed May 26, 1976. No appeal was taken by the District of Columbia.

(c) D.C.R.L.A. and Bresler and Reiner, Inc. v. D.C., Tax Docket 2289. Trial Court Opinion and Order was dated September 30, 1976 and cited Burlington I. Final Order was signed October 20, 1976. District of Columbia filed a notice of appeal and then dismissed the appeal.

(d) D.C.R.L.A. and Trilon Plaza Co. v. D.C., Tax Dockets 2311 and 2374 were tried in February and March, 1976 and are awaiting decision in the Trial Court. There were repeated citations to the Burlington I opinion during the course of the trial.

(e) D.C.R.L.A. and Trilon Plaza Co. v. D.C., Tax Docket 2372: The case was tried May 17 and 18, 1977 and during the trial there were repeated citations to Burlington I. The case was settled by stipulation between the parties.

Burlington I was also cited by counsel in Petitioners' Motion for Judgment filed in October,

The lack of procedural due process is obvious.

Before the panel decided Keyes it specifically asked for comment on Burlington I on February 27, 1976. The comments were filed March 15, 1976 and March 24, 1976. Burlington I was then withdrawn and vacated April 23, 1976 without notice to counsel for taxpayers. Keyes was decided on July 23, 1976 squarely based on the Burlington I principle, but with no reference to the fact that the Court had vacated Burlington I.

Counsel for Keyes were deprived of the powerful value of the vacating of

3/ (cont'd)
1976 in Tax Dockets 2369, 2370, 2375, and 2374.

The citations of Burlington I in those cases in no way changes the results of those cases, but the fact that the Court and both parties freely cited Burlington I during the period March 1, 1976 - July 1, 1977 shows clearly that they were unaware they were citing a vacated opinion.

Burlington I and the substantial doubt thereby cast on the validity of the Burlington principle.

Counsel for Keyes, in preparing the petition for reargument in Keyes filed September 16, 1976, did not include the overwhelming argument that Keyes had been decided on the Burlington I principle after Burlington I had been vacated, with notice only to one side in the case.

If we had been told that Burlington I had been vacated, our petition for rehearing en banc filed September 16, 1976 would have contained a paragraph something like the following:

> "This opinion is identical with the opinion in Burlington handed down on January 29, 1976. Like Burlington, it finds that the failure to follow the administrative path annuls the subject-matter jurisdiction of the Superior Court. Burlington has been vacated by this Court and has been set down for rehearing en banc before the full Court.

> This case should receive identical treatment, since it raises the identical issue of subject-matter jurisdiction.
>
> We respectfully request that the opinion in Keyes be similarly vacated, and the appeal held in abeyance until the decision in Burlington, or preferably listed for argument en banc on the same day that Burlington will be heard."

We are confident that this Court in September, 1976 would without question have granted us the same treatment as Burlington.

The demands of equal treatment for both sides and due process require that the appellees have a fair hearing before this Court. In the words of Justice Frankfurter, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 643-44 (1951) (concurring opinion):

> . . ."due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which

> has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, past course of decisions, and stout confidence in the strength of the democratic faith which we profess. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Taxpayers respectfully ask the Court for the "just treatment" required by the due process guarantee.

5. Withdrawal of Mandate.

(a) Grounds. The mandate in No. 8790 issued April 26, 1977. This is in the January 1977 term. See Rule 2 of the Rules of this Court. It is within the power of this Court to withdraw the mandate

for "good cause". See Greater Boston Television Corp. v. FCC, 149 U.S.App.D.C. 322, 463 F.2d 268, 276-79 (D.C.Cir. 1971) (Leventhal, Tamm and MacKinnon J.J.).

Decision to recall mandate by an appellate court will be granted for "good cause" shown. "Good cause" is the showing of a need to avoid injustice. It has a foundation in the inherent power of the court[4/] and may be done during the term the mandate issued.[5/]

The basic principle authorizing an appellate court to vacate any judgment is as may be just under the circumstances.

4/ In federal courts the power is also statutory. 28 USCA §2106.

5/ In federal courts the mandate may issue outside the term. 28 USCA §452.

Greater Boston Television Corp., supra.[6/]

(b) Effect. No one is hurt by the withdrawal of the mandate. The position of the District has not changed. No money has been spent by the District in reliance on the mandate. The parties are in exactly the same position they were in in 1973.

6/ We do not think the District will object on procedural grounds in any case. In the U. S. Court of Appeals in No. 74-1482, Met. Wash. Coalition for Clean Air v. D.C., after the Court had issued its mandate and summarily ordered the closing of Incinerator #5, the District, without any grounds, moved March 13, 1975 to recall the mandate. A copy of the District's motion is attached (Exhibit A). As will appear, the Court on March 31, 1976 granted the motion, which had been opposed. As a result, the District was ultimately able to reverse the result, preventing the closing of the Incinerator. A copy of the Court's Order recalling mandate is attached (Exhibit B).

Conclusion

This case, in essence, raises a deceptively simple issue. The panel which wrote the Keyes opinion in July, 1976 squarely decided that the Superior Court had no subject-matter jurisdiction over the controversy (everything else said in the opinion is the rankest dictum). That decision was based on an earlier Burlington I opinion in January, 1976 signed by the same two judges who wrote the majority opinion in Keyes. That earlier opinion had been vacated by the full court in April, 1976 before Keyes was written. The two judges, however, repeated in Keyes in July what had been vacated in April by the full court. Counsel for Keyes was never informed directly or indirectly, that the earlier Burlington I opinion had been vacated by the full Court and based all of his subsequent actions in

the case on the assumption that this earlier Burlington I opinion was still in full force and effect.

Promptly upon learning the true fact that the full Court had vacated that opinion before Keyes was decided, counsel for Keyes filed this motion.

It is rather hard to think of a series of events which more effectively could deny the 33,000 Keyes taxpayers equal protection of the laws and the right to a full and fair hearing.

Respectfully submitted,

GILBERT HAHN, JR., ESQ.
PHILIP W. AMRAM, ESQ.
MARY KATHLEEN HITE, ESQ.
Wolf, Block, Schorr and
Solis-Cohen
11th Floor
1150 Connecticut Avenue,N.W.
Washington, D. C. 20036
(202) 783-3344
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to the Court En Banc to Withdraw the Mandate of this Court in No. 8790 Issued April 26, 1977 During this Same Term in Order to Prevent Injustice and Grant Hearing En Banc in No. 8790 Because of District of Columbia v. Burlington Decided June 13, 1977, was mailed, postage prepaid, this 7th day of July, 1977, to Louis Robbins, Esq., Assistant Corporation Counsel, D.C., District Building, 14th and E Streets, N. W., Washington, D. C. 20004, Counsel for Appellants.

GILBERT HAHN, JR., ESQ.

 Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1482	)	
Metropolitan Washington Coalition for Clean Air, et al.	)	
v.	)	Civil Action 1424-73
District of Columbia, et al.	)	
Appellants	)	
No. 74-1507	)	
Metropolitan Washington Coalition for Clean Air, et al.	)	
Appellants	)	
v.	)	Civil Action 1424-73
District of Columbia A Municipal Corporation	)	

MOTION TO RECALL MANDATE

On the grounds and for the reasons set forth below, appellee-appellants in the above-entitled cause move the Court to recall the mandate issued on March 11, 1975.

The order issued by the Court granting the motion of the Metropolitan Washington Coalition for Clean Air for summary reversal

in No. 74-1507, dismissing the appeal in 74-1482, and directing the Clerk to promptly certify the order to the District Court has left the appellee-appellants without an opportunity to move the Court for reconsideration of its order. The order states that an opinion of Court will be filed at a later date. Until the appellee-appellants have had the opportunity to study the opinion of this Court, they will have no way of determining the grounds upon which the Court has entered the order.

The Court is therefore requested to recall its mandate in order to give the appellee-appellants the opportunity to move this Court for reconsideration should that be advisable after the

opinion has issued.

/c/ C. Francis Murphy
C. FRANCIS MURPHY
Corporation Counsel, D. C.

/s/ Louis P. Robbins
LOUIS P. ROBBINS
Principal Assistant Corporation Counsel, D.C.

/s/ John C. Salyer
JOHN C. SALYER
Assistant Corporation Counsel, D. C.

Attorneys for District of Columbia
District Building
Washington, D.C. 20004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion to recall mandate was mailed, postage prepaid, to Gilbert Hahn, Jr., Esquire, Amram, Hahn & Sandground, 700 Colorado Building, Washington, D.C. 20005, this 13th day of March, 1975.

/s/ John C. Salyer
Assistant Corporation Counsel, D. C.

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 74-1482 SEPTEMBER TERM, 1974

Civil Action 1488-73
Metropolitan Washington Coalition
for Clean Air, et al.

v. FILED MAR 31 1975

District of Columbia, et al., HUGH E. KLINE
Clerk

Appellants

NO. 74-1507 Civil Action 1424-73
Metropolitan Washington Coalition
for Clean Air, et al.,

Appellants

v.

District of Columbia,
a municipal corporation

Before: Wright and Leventhal, Circuit Judges

O R D E R

On consideration of appellees-appellants' motions for extension of time for reconsideration and to recall mandate, and of the oppositions thereto, it is

ORDERED by the Court that the aforesaid motions are granted and the Clerk of the District Court is requested to return forthwith the certified copy of this Court's order of March 11, 1975, and, it is

FURTHER ORDERED by the Court that the time for filing a motion for reconsideration is extended for a period of 10 days from the issuance of this Court's opinion.

Per Curiam

For the Court:

HUGH E. KLINE, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED Sep 13 1977

Alexander L. Stevas
Clerk

NO. 8790 January Term, 1977

THE DISTRICT OF COLUMBIA
a Municipal Corporation, and
WALTER E. WASHINGTON, and
KENNETH BACK,

Appellants,

v. Tax Div.No. 2214

ARTHUR H. KEYES, JR., and
LUCILLE KEYES,
On behalf of themselves and
others similarly situated,

Appellees.

BEFORE: Newman, Chief Judge; Kelly, Kern, Gallagher, Nebeker, Yeagley, Harris and Mack, Associate Judges; Pair, Associate Judge, Retired.

O R D E R

On consideration of appellees' "Motion to the Court En Banc to Withdraw the Mandate of this Court in No. 8790 Issued April 26, 1977 During This Same Term in Order to Prevent Injustice and Grant Hearing En Banc in No. 8790 Because of District of Columbia v. Burlington Decided June 13, 1977" and of responsive pleadings filed with respect

thereto, it is

ORDERED by the Court en banc that appellees' aforesaid motion is denied.

PER CURIAM

Copies to:

Honorable Joyce Hens Green
Judge, Superior Court of the District of Columbia

Clerk, Superior Court of the District of Columbia

Louis P. Robbins, Esquire
Principal Deputy Corporation Counsel

Gilbert Hahn, Jr., Esquire
1150 Connecticut Ave., N.W.
11th Floor (36)

DISTRICT OF COLUMBIA COURT OF APPEALS

District of Columbia
Court of Appeals

DISTRICT OF COLUMBIA, et al. : REC'D
: Sep 22 1977
Appellants :
: Alexander L.
v. : Stevas, Clerk
: NO. 8790
ARTHUR H. KEYES, et al. :
:
Appellees :

MOTION TO WITHDRAW AND STAY MANDATE PENDING APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI

Come now Appellees in the above-entitled case, through counsel, and pray the Court to withdraw and stay the mandate of this Court in No. 8790 solely to allow appellees to apply for a writ of certiorari to the Supreme Court of the United States and as grounds therefor state the following:

1. Appellees seek this withdrawal and stay of mandate in order to file a timely petition for a writ of certiorari from the

Order of September 13, 1977 denying appellees' "Motion to the Court En Banc to Withdraw the Mandate of this Court in No. 8790 Issued April 26, 1977 During this Same Term in Order to Prevent Injustice and Grant Hearing En Banc in No. 8790 Because of District of Columbia v. Burlington decided June 13, 1977."

2. Appellees' petition for a writ of certiorari will be irreparably prejudiced if the mandate is not withdrawn and stayed pending the preparation, filing, consideration and decision on the petition and any further proceedings in the Supreme Court of the United States.

3. The mandate in this case issued April 26, 1977 during this term of Court and appellees' Motion to the Court En Banc to Withdraw the Mandate, etc. was timely filed during this Term of Court. Appellees intend to file a petition for a writ of certiorari within the time allowed by law. However,

pursuant to Rule 2 of the Rules of this Court, the current term of this Court will expire on December 31, 1977. Appellees cannot predict that the writ of certiorari process will be completed before December 31, 1977. We can, however, assume that should the writ be granted, any further proceedings in the Supreme Court will not be completed during the current term of the Court (January 1 to December 31, 1977).

4. If appellees ultimately prevail in the Supreme Court resulting in an Order to this Court to withdraw the mandate and to grant appellees a hearing en banc, the relief could be rendered worthless for that reason alone if the current term of the Court, as anticipated, has by then expired.

5. Appellees are sure that the Court will agree that the constitutional question posed to this Court (and to be

posed to the Supreme Court) is unusual. And, for that reason, the rare remedy of withdrawal of the mandate is the only procedural device for asking for a Fifth Amendment remedy if there is one. This is why this unusual request is made to the Court.

6. The relief sought by appellees, although unusual, is consistent with the spirit of the Rules of this Court. Rule 41(b) authorizes a stay of mandate pending Application for Certiorari. Appellees are simply asking that the Court grant similar relief here by withdrawing and staying the mandate during the pendency of the petition to the Supreme Court.

7. Appellees will suffer irreparable harm if the mandate is not withdrawn and stayed while appellees seek Supreme Court review of their serious equal protection and due process claims set forth in the Motion to

Withdraw the Mandate, etc. denied by this Court on September 13, 1977. There can be no prejudice to appellants from the granting of this Motion. The granting of the Motion will, however, safeguard appellees' due process rights to an effective remedy should appellees prevail in the Supreme Court during the next term of this Court.

WHEREFORE, appellees respectfully pray this Court to enter an Order Withdrawing and Staying the Mandate in this case pending application for a writ of certiorari to the Supreme Court of the United States.

Respectfully submitted,

/s/ Gilbert Hahn, Jr.
GILBERT HAHN, JR., ESQ.
Wolf, Block, Schorr and
Solis-Cohen
1150 Connecticut Avenue, N.W.
Washington, D. C. 20036
783-3344
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a copy of the

foregoing Motion to Withdraw and Stay Mandate Pending Application for Writ of Certiorari was mailed, postage prepaid, this 22nd day of September, 1977, to Louis Robbins, Esq., Principal Assistant Corporation Counsel, D.C., District Building, 14th and E Streets, N. W., Washington, D. C. 20004, counsel for appellants.

/s/ Gilbert Hahn, Jr.
GILBERT HAHN, JR., ESQ.

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED Oct 11 1977

Alexander L. Stevas
Clerk

NO. 8790 January Term, 1977

THE DISTRICT OF COLUMBIA
a Municipal Corporation, and
WALTER E. WASHINGTON, and
KENNETH BACK,

Appellant

v. Tax Div.No. 2214

ARTHUR H. KEYES, JR., and
LUCILLE KEYES,
On behalf of themselves and
others similarly situated,

Appellees.

BEFORE: Kelly and Gallagher, Associate Judges, and Pair, Associate Judge, Retired.

ORDER

On consideration of appellees' motion to withdraw and stay this Court's mandate pending application to the Supreme Court of the United States for a writ of certiorari, it is

ORDERED that appellees' motion is denied.

PER CURIAM

Copies to:

Honorable Joyce Hens Green
Associate Judge, Superior Court
of the District of Columbia

Clerk, Superior Court of the
District of Columbia

Louis P. Robbins, Esquire
Principal Deputy Corporation Counsel

Gilbert Hahn, Jr., Esquire
1150 Connecticut Avenue NW, 20036